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No.

IN THE

Supreme Court of the United States

October Term, 1982

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO and
VISTA IRRIGATION DISTRICT,

Petitioners,

vs.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA and PALA BANDS OF
MISSION INDIANS, and THE SECRETARY OF INTERIOR in his
capacity as trustee for said Bands,

Respondents.

**Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

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Questions Presented for Review

Petitioners, who were jointly granted a license to operate Federal Power Project No. 176 by the Commission, respectfully seek review of the following issues which are the basis of the Ninth Circuit reversal:

1. Does the Act of January 12, 1891, 26 Stat. 712, permit the Mission Indian Bands to veto the Commission's decision to relicense a federal power project by withholding consent to the continued used of reservation lands?
2. Does section 4(e) of the Federal Power Act permit the Secretary of Interior to veto the Commission's decision to relicense a federal power project by imposing unreasonable conditions on the continued use of reservation lands?
3. Are Indian "water rights" a "reservation" within the meaning of section 4(e) of the Federal Power Act?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Opinions Below	2
Statement of Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
The Ninth Circuit Opinion Conflicts With Prior Decisions of This Court and Raises Important Issues of Law Which Should Be Settled by This Court	7

I

Permitting Indian Bands to Veto a Commission Re- licensing Decision Is Contrary to Express Congres- sional Intent, Inconsistent With Long-standing Ad- ministrative Interpretation and Conflicts With Other Decisions of This Court	7
A. The Federal Power Act Applies to Indian Lands	8
B. Congress Expressly Rejected an Indian Veto, and Protected Indian Lands in Other Ways	9
C. The Commission Consistently Has Interpreted the Act as Not Permitting an Indian Veto	11
D. An Indian Veto Is Inconsistent With Other Decisions of This Court Which Have Denied States a Veto	11

	Page
E. An Indian Veto Is Inconsistent With Other Decisions of This Court Which Have Authorized the United States and Its Licensees to use Indian Lands Without Obtaining Indian Consent	13
F. An Indian Veto Imperils All Projects Located on Indian Lands	14

II

Permitting Interior to Veto a Commission Relicensing Decision Is Contrary to Congressional Intent, Inconsistent With Long-standing Administrative Interpretation, Conflicts With Other Decisions of This Court and Jeopardizes All Projects on Federal Reservation Land	14
A. The FPA's Legislative History Supports the Independence of the Commission	15
B. The Commission Consistently Has Interpreted the Act as Not Providing Interior With a Veto	16
C. An Interior Veto Is Inconsistent With Other Decisions of This Court	16
D. A Secretarial Veto Is Inappropriate in a Relicensing Context	17
E. A Secretarial Veto Is Particularly Inappropriate When Interior's Trust Responsibility Is Involved	18

III

The Ninth Circuit's Holding That "Water Rights" Are a "Reservation" for Section 4(e) Purposes Is a Strained and Unnecessary Interpretation That Jeopardizes All Federal Power Projects	19
--	----

A. The Ninth Circuit's Interpretation Is Inconsistent With Both the Statutory Language and the Commission's Long-standing Interpretation of It	19
B. It Was Unnecessary for the Ninth Circuit to Distort the Meaning of the FPA in Order to Protect Indian Water Rights	20
C. The Ninth Circuit's Interpretation Jeopardizes All Federal Power Projects	21
Conclusion	22

INDEX TO APPENDIX

	Page
Escondido Mutual Water Co. v. Federal Energy Regulatory Comm'n (1982 9th Cir.) 692 F.2d 1223....	1
Escondido Mutual Water Co. v. Federal Energy Regulatory Comm'n (1983 9th Cir.) 701 F.2d 826	31
Escondido Mutual Water Co., Project 176 et al. (1979) 6 FERC ¶61,189, 20 F.P.S. 5-614 (Opinion 36)	42
Escondido Mutual Water Co., Project 176 et al. (1979) 9 FERC ¶61,241, 19 F.P.S. 5-659 (Opinion 36-A)	310
Act of January 12, 1891, 26 Stat. 712 (Mission Indian Relief Act or MIRA)	379
Preamble	379
§ 2	379
§ 8	379
Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. § 791a, et seq. (Federal Power Act or FPA)	380
§ 3(2), 16 U.S.C. § 796(2)	380
§ 4(e), 16 U.S.C. § 797(e)	381
§ 10(a), 16 U.S.C. § 803(a)	382
§ 10(e), 16 U.S.C. § 803(e)	382
§ 10(i), 16 U.S.C. § 803(i)	384
§ 14, 16 U.S.C. § 807	384
§ 15(a), 16 U.S.C. § 808(a)	386
§ 15(b), 16 U.S.C. § 808(b)	387
§ 27, 16 U.S.C. § 821	387
§ 29, 16 U.S.C. § 823	388

TABLE OF AUTHORITIES

Cases	Page
American Paper Institute, Inc. v. American Electric Power Service Corp. (1983) — U.S. —, 51 U.S.L.W. 4547	11, 16
Cappaert v. United States (1976) 426 U.S. 128	21
Chemehuevi Tribe of Indians v. Federal Power Comm'n (1973 D.C. Cir.) 489 F.2d 1207, affirmed (1975) 420 U.S. 395	14, 15, 20
Cherokee Nation v. Southern Kansas Railway Co. (1890) 135 U.S. 641	13
Colorado River Water Conserv. Dist. v. United States (1976) 424 U.S. 800	21
Escondido Mutual Water Company, Project 176 et al. (1983) 22 FERC ¶61,350	3
Escondido Mutual Water Company, Project 176, et al. (1982) 18 FERC ¶61,299	3
Escondido Mutual Water Co. v. Federal Energy Regulatory Comm'n (1982 9th Cir.) 692 F.2d 1223, reh'g denied (1983 9th Cir.) 701 F.2d 826.....	2, 5, 8, 9, 10, 12, 14, 15, 19, 20, 21
Escondido Mutual Water Co., Project 176 et al. (1981) 17 FERC ¶61,157	5
Escondido Mutual Water Co., Project 176 et al. (1979) 9 FERC ¶61,241, 19 F.P.S. 5-659	2, 4
Escondido Mutual Water Co., Project 176 et al. (1979) 6 FERC ¶61,189, 20 F.P.S. 5-614	2, 4
Escondido Mutual Water Co., Project 176 et al. (1977) 6 FERC ¶63,008	2, 4, 18
Federal Power Comm'n v. Idaho Power Co. (1952) 344 U.S. 17	17
Federal Power Comm'n v. State of Oregon (1955) 349 U.S. 435	8, 12, 13, 14, 16

	Page
Federal Power Comm'n v. Tuscarora Indian Nation (1960) 362 U.S. 99	8, 9, 10, 13, 14, 16, 18, 20
First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n (1946) 328 U.S. 152...11, 12, 13, 14, 16, 21	21
Lac Court Oreilles Band v. Federal Power Comm'n (1975 D.C. Cir.) 510 F.2d 198	3
Montana Power Co. v. Federal Power Comm'n (1971 D.C. Cir.) 459 F.2d 863, cert. denied (1972) 408 U.S. 930	10, 16
Montana Power Co. v. Federal Power Comm'n (1970 D.C. Cir.) 445 F.2d 739, cert. denied (1971) 400 U.S. 1013	11
NAACP v. Federal Power Comm'n (1976) 425 U.S. 662	20
Pacific Gas & Electric Co. (1975) 53 F.P.C. 523 ..16, 17	17
Pigeon River Lumber Co. (1935) 1 F.P.C. 206.....	10, 11, 16
Rincon Band et al. v. Escondido Mutual Water Co. et al., U.S. Dist. Ct., S.D. Cal. Nos. 69-217-S, 72- 271-S, 72-276-S	21
Spalding v. Chandler (1896) 160 U.S. 394	13
State of Arizona v. State of California, 373 U.S. 599	21
State of Arizona v. State of California (1983) — U.S. —, 51 U.S.L.W. 4325	21
United States v. First National Bank (1914) 234 U.S. 245	20
Winters v. United States (1908) 207 U.S. 564	21

Statutes	Page
Act of January 12, 1891, 26 Stat. 712 (Mission Indian Relief Act)	i, 2, 5, 7, 8, 12, 13
Act of February 10, 1891, 26 Stat. 745	14
Act of May 18, 1916, 39 Stat. 123	14
Act of June 10, 1920, 41 Stat. 1063 as amended, 16 U.S.C. 791a, et seq. (Federal Power Act)	<i>Passim</i>
1, 16 U.S.C. §792	16
3(2), 16 U.S.C. §796(2)	2, 5, 8, 9, 19, 20
4(e), 16 U.S.C. §797(e)	
..... i, 2, 4, 5, 8, 9, 10, 11, 14, 16, 17, 18, 19	
9(b), 16 U.S.C. §802(b)	21
10(a), 16 U.S.C. §803(a)	2, 10, 16, 17, 19
10(e), 16 U.S.C. §803(e)	2, 4, 5, 9, 10, 11, 16
10(i), 16 U.S.C. §803(i)	2, 10
14(b), 16 U.S.C. §807(b)	2, 4
15(a), 16 U.S.C. §808(a)	2, 3, 10, 17
15(b), 16 U.S.C. §808(b)	2, 4
23(b), 16 U.S.C. §817(b)	8
27, 16 U.S.C. §821	2, 21
29, 16 U.S.C. §823	2, 10
313(b), 16 U.S.C. §8251(b)	2, 5, 15
Act of June 23, 1930, 46 Stat. 797	16
25 U.S.C. §177	13
25 U.S.C. §§323-328	10
25 U.S.C. §476	11
28 U.S.C. §1254(1)	2

	Page
42 U.S.C. §7101, et seq.	3
43 U.S.C. §666	21
Administrative Procedure Act, 5 U.S.C. §§701-706 (1976)	15
Legislative History	
59 Cong. Rec. 1534 (1920)	9
59 Cong. Rec. 1565 (1920)	9
H.R. Rep. No. 910, 66th Cong. 2d Sess. (1920)	9
H.R. 8716, 65th Cong. 2d Sess. (1918)	15
Treatise	
Pinchot, The Long Struggle for Effective Federal Water Power Legislation (1945) 14 Geo. Wash. L. Rev. 9	8

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LA JOLLA, RINCON, SAN PASQUAL, PAUMA and PALA BANDS OF
MISSION INDIANS, and THE SECRETARY OF INTERIOR in his
capacity as trustee for said Bands,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioners, Escondido Mutual Water Company (Mutual), City of Escondido (City) and Vista Irrigation District (Vista),¹ respectfully pray that a Writ of Certiorari issue to review the opinion of the Court of Appeals for the Ninth Circuit entered November 2, 1982, as modified on denial of rehearing on March 17, 1983.

¹Other Parties to the proceedings below included: The La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians (Bands); the Secretary of Interior in his capacity as trustee for the Bands (Interior); and the Federal Energy Regulatory Commission (Commission).

Several other parties were represented before the Commission but took no part before the Ninth Circuit: San Diego Gas & Electric Company; California Department of Fish and Game; and Uihlein Hansen.

Opinions Below

The Opinion of the Ninth Circuit is reported at 692 F.2d 1223, (Appendix (App.) 1-30). The Order denying rehearing with Anderson J. concurring and dissenting is reported at 701 F.2d 826 (App. 31-41). Commission Opinion and Order No. 36 is reported at 6 FERC ¶61,189, 20 F.P.S. 5-614 (App. 42-309). Commission Opinion and Order No. 36-A on rehearing is reported at 9 FERC ¶61,241, 19 F.P.S. 5-659 (App. 310-378). The Initial Decision of the Administrative Law Judge (ALJ) is reported at 6 FERC ¶63,008 (not included in Appendix).

Statement of Jurisdiction

The Court has jurisdiction of this petition pursuant to 28 U.S.C. §1254(1). Jurisdiction in the Court below was based on FPA §313(b), 16 U.S.C. §825l(b).

The judgment sought to be reviewed, *Escondido Mutual Water Co. v. Federal Energy Regulatory Commission* (1982 9th Cir.) 692 F.2d 1223, was filed on November 2, 1982. The Order denying rehearing, *Escondido Mutual Water Co. v. Federal Energy Commission* (1983 9th Cir.) 701 F.2d 826, was filed on March 17, 1983.

On March 31, 1983, Petitioners' Motion for a Stay of Mandate was granted until June 15, 1983, and upon filing this petition, until disposition by this Court.²

Statutes Involved

The major statutes involved are Section 8 of the Mission Indian Relief Act (MIRA), Act of June 12, 1891, 26 Stat. 712. (App. 379-80) and various provisions of the Federal Power Act (FPA), Act of June 10, 1920, 41 Stat. 1063, as amended (16 U.S.C. §791a, et seq.) including §§3(2), 4(e), 10(a), 10(e), 10(i), 14, 15(a), 15(b), 27 and 29 (App. 380-388).

²On June 6, 1983, the Court granted the Commission an extension of time until July 15, 1983, in which to file a petition for a writ of certiorari.

Statement of the Case

The Commission³ first licensed Project No. 176 to Mutual in June, 1924 for a fifty-year term. Project 176 includes the Escondido Canal, originally constructed in 1895, which conveys water 13.5 miles from the San Luis Rey River to Lake Wohlford near Escondido. It traverses portions of the La Jolla, Rincon and San Pasqual Indian Reservations, and other government and private lands. Other major Project works include Lake Wohlford Dam and Reservoir constructed in 1895 on private and government land, the Bear Valley powerhouse⁴ constructed in 1915 on private land, and the Rincon powerhouse constructed in 1916 on the Rincon Reservation. The Pauma and Pala Indian Reservations are within the San Luis Rey River watershed, but are located several miles downstream from any Project works. (See App. 30 for a map of the Project)⁵

In 1971, Mutual applied, pursuant to §15(a),⁶ App. 386, for a new fifty-year license to operate Project No. 176.⁷ The Bands

³The term "Commission" refers to both the Federal Power Commission, and its successor the Federal Energy Regulatory Commission. (See 42 U.S.C. §§7101-7295).

⁴The Bear Valley powerhouse was destroyed by a mudslide in March 1980 and is currently being reconstructed at a cost of approximately \$1,300,000. (22 FERC ¶61,350; see also, 18 FERC ¶61,299 (expansion of Bear Valley powerhouse delayed pending a final decision on relicensing)). An additional application to add a third powerhouse to the Project is still pending.

⁵Project 176 occupies approximately 1,200 acres. Of this 87.4 acres (7.3%) is Indian Reservation land, 406.1 acres (33.8%) is other federal land, 662 acres (55.2%) is owned by Mutual, and 43.9 acres (3.6%) are other private lands over which Mutual has rights-of-way. (Opinion 36, App. 51) When Vista's Henshaw Dam and reservoir are included (see note 9, *infra*) the Indian Reservation lands will comprise less than 2% of Project 176.

⁶Unless otherwise noted, all section references are to the Federal Power Act (FPA), 16 U.S.C. §791a, *et seq.* For parallel citations to the United States Code, see the table of authorities, *infra*.

⁷Since the expiration of the original license in June, 1974, Mutual has operated the Project under annual licenses. (See §15(a), App. 386; see also *Lac Courte Oreilles Band v. Federal Power Comm'n* (1975 D.C. Cir.) 510 F.2d 198, 205 (Section 15(a) mandates the grant of annual licenses even absent Indian consent, or Interior approval))

and Interior subsequently intervened.

The Bands sought to have the Project licensed to them as a non-power project under §15(b), App. 387. Interior sought to impose conditions under §4(e) on any new license issued to Mutual, recommended federal takeover of the Project (§14, App. 384), or alternatively, supported the Bands' application for a non-power license.

On June 1, 1977, the Administrative Law Judge (ALJ) issued his Initial Decision. (See 6 FERC ¶63,008) The ALJ ruled that because the power production was so incidental to the Project's major purpose—irrigation—the Commission lacked jurisdiction to relicense it; but, if the Commission found jurisdiction, then a new fifty-year license should be issued jointly to Mutual, City⁸ and Vista⁹.

On February 26, 1979, the Commission issued Opinion No. 36 (6 FERC ¶61,189, App. 42), and ruled, *inter alia*, that: it had jurisdiction over Project 176; a new license should issue jointly to Mutual, City and Vista; annual charges for the use of Indian lands pursuant to §10(e), App. 382, should be substantially increased; and the new license should be subject to additional conditions, including the delivery of water to the Bands.

The Commission granted rehearing and on November 26, 1979, issued Opinion No. 36-A (9 FERC ¶61,241, App. 310), and ruled *inter alia*, that: Mutual's net investment was zero; if the Project were not relicensed to Mutual, it would not be entitled to severance damages; and a new licensee would not be obligated to assume any of Mutual's contracts. Opinion No. 36-A also modified the annual charges and clarified the requirement to supply water to the Indians. Issuance of the new license was stayed for two years pursuant to §14(b), App. 385, during which time Interior could attempt to persuade Congress to authorize

⁸In 1975, City, which is in the process of acquiring Mutual, filed an application seeking to become a joint applicant with Mutual.

⁹Water is released from Vista's Henshaw Dam into the San Luis Rey River, diverted into the Escondido Canal and then transported through the Project works for delivery to the Escondido and Vista communities. The importance of Henshaw Dam to the Project convinced the ALJ to include it as part of the Project works and make Vista a joint licensee.

federal takeover.¹⁰

Pursuant to §313(b), all parties except the Commission petitioned for review of Opinions 36 and 36-A. The petitions were consolidated and argued on July 6, 1982, before a three-judge panel of the Ninth Circuit.

On November 2, 1982, the Ninth Circuit issued its decision. (*Escondido Mutual Water Co., v. Federal Energy Regulatory Commission* (1982 9th Cir.) 692 F.2d 1223, App. 1). The Court affirmed the Commission's jurisdiction; but, held that: in addition to securing a federal power license, MIRA §8 required petitioners to obtain rights-of-way for the Project from the Bands; §4(e) required the Commission to include in the new license, any conditions proposed by Interior without regard to their reasonableness; and, Indian "water rights" were a "reservation" within the meaning of §4(e).

All parties petitioned for rehearing, and on March 17, 1983, the Court issued its decision denying rehearing. (*Escondido Mutual Water Co., v. Federal Energy Regulatory Commission* (1983 9th Cir.) 701 F.2d 826, App. 31)

Circuit Judge Anderson dissented. He wrote that: the majority's interpretation of MIRA §8 "conflicts with the Federal Power Act's . . . pervasive scheme for obtaining rights-of-way over tribal land" (701 F.2d at 828, App. 34); the "legislative history [of MIRA] bears no indication that Congress intended §8 as the exclusive means of obtaining rights-of-way" (701 F.2d at 828, App. 34); the "[l]egislative history of the FPA is also at odds with our opinion" (701 F.2d at 829, App. 37); and, that "§§3(2), 4(e) and 10(e) of the FPA are express congressional authority for acquiring such property." (701 F.2d at 830, App. 39) He also

¹⁰That stay expired without any Congressional action. On November 20, 1982, the Commission issued a new stay pending the completion of judicial review. (17 FERC ¶61,157.)

“would place the initial reasonableness decision [respecting Interior’s conditions] on FERC” and concluded that “FERC properly interpreted and applied §4(e) and that all of its findings in that regard are supported by substantial evidence.” (701 F.2d at 831, App. 41)

These quotations succinctly state the reasons for granting this Petition.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT OPINION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND RAISES IMPORTANT ISSUES OF LAW WHICH SHOULD BE SETTLED BY THIS COURT

This is one of the first contested cases involving the relicensing of a federal power project. The manner in which it is resolved will profoundly impact many major projects due for relicensing.¹¹ The opinion below threatens the authority of the Commission to relicense federal power projects located on or near federal reservation lands.¹²

I

PERMITTING INDIAN BANDS TO VETO A COMMISSION RELICENSING DECISION IS CONTRARY TO EXPRESS CONGRESSIONAL INTENT, INCONSISTENT WITH LONG-STANDING ADMINISTRATIVE INTERPRETATION AND CONFLICTS WITH OTHER DECISIONS OF THIS COURT

The holding that, in addition to an FPA license, Petitioners must obtain the consent of the Indian Bands for rights-of-way across the Mission Indian Reservations, pursuant to Act of January 12, 1891, 26 Stat. 712, Mission Indian Relief Act (MIRA),¹³

¹¹ According to information from the Commission Staff, 136 major license projects will be due for relicensing in the next decade.

¹² According to Commission's Counsel at the July 6, 1982 oral argument, 606 federal projects utilize federal lands and reservations, and 35 utilize Indian reservations.

¹³ Section 8 of MIRA provides in part:

"Subsequent to the issuance of any tribal patent, . . . any citizen . . . may contract with the tribe, . . . for the right to construct . . . appliances for the conveyance of water over . . . such lands, which contract *shall* not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose." (Emphasis added, full text in App. 379)

It is of interest that both the permissive "may" and mandatory "shall" were used. If Congress had meant that "may contract" should mean "shall contract", it would have so written. Moreover, if this were an oversight, surely someone on behalf of the Mission Indians would have brought it to the attention of one of the 45 Congresses which have convened since its adoption.

gives them a *veto* over Project 176.

The Court fairly analyzes section 8 "at the time of its passage" (692 F.2d at 1233, App. 20); however, its conclusion that "[s]ection 8 of MIRA is . . . a carefully conditioned and circumscribed delegation of that [*i.e.* Congressional] power to Interior, and to the Band themselves" (692 F.2d at 1233 n.6, App. 20) cannot withstand scrutiny.

This conclusion makes time stand still between 1891 and 1983. It ignores all Congressional purposes for water power development as expressed in the FPA (see, Pinchot, *The Long Struggle for Effective Federal Water Power Legislation* (1945) 14 Geo. Wash. L. Rev. 9) and renders vacuous the affirmance of Commission jurisdiction over Project 176.

Even if MIRA and the FPA were construed as contemporaneous expressions of Congressional intent, the differences are manifest. MIRA does not deal with water power development (*i.e.*, dams, reservoirs, powerhouses, electric lines, etc.). Rather, it is specifically limited to ". . . a flume, ditch, canal, pipe or other appliances for conveyance of water over . . . such lands . . ." (MIRA §8, App. 380)

Neither does MIRA deal with the rights of the United States or its licensees to use Indian lands. In fact, these reservation patents specifically reserved "a right-of-way thereon for ditches or canals constructed by the authority of the United States." Rather, section 8 of MIRA applied to "any citizen . . . [who] may contract. . . ." Project 176 is a power project which must be licensed under §23(b). (*Federal Power Comm'n v. State of Oregon* (1955) 349 U.S. 435, 442-445)

A. The Federal Power Act Applies to Indian Lands

Section 4(e) empowers the Commission "to issue licenses . . . upon any part of the public lands and reservations of the United States . . ." (App. 381), and section 3(2) defines "reservation" to include "tribal lands embraced within Indian reservations." (App. 380)

In *Federal Power Commission v. Tuscarora Indian Nation* (1960) 362 U.S. 99, the Court emphasized the comprehensive nature of the FPA, and wrote:

“The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. See §4(e). *It neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians — tribal lands embraced within Indian reservations. See §§3(2) and 10(e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians.*” (362 U.S. at 118) (emphasis added)

B. Congress Expressly Rejected an Indian Veto, and Protected Indian Lands in Other Ways

During Senate debate on the FPA, the Senate amended section 4(e) so that; “. . . no license shall be authorized except by and with the consent of the council of the tribe.” (59 Cong. Rec. 1534 (1920))

This amendment was rejected in conference and stricken from the bill. The conference report states:

“The Senate conferees . . . saw no reason why water power use should be singled out from all other uses of Indian reservation land for special action of the council of the tribe.” (H. R. Rep. No. 910, 66th Congress, 2d Sess. at 8.)

The arguments made during the debate demonstrate that Congress expressly dealt with the issue. For example, Senator Myers stated:

“If this amendment becomes a law, it would be in the power of a tribe of Indians, arbitrarily and without any reason whatever, to block a project for water-power development. . . . They would have an absolute power of veto.” (59 Cong. Rec. at 1565)

Although Justice Anderson grasped the importance of this history (701 F.2d at 829, App. 37), the majority totally ignored it.¹⁴ Congress protected the Indians in other ways.

Section 4(e) requires a finding "that the license will not interfere with the purpose for which such reservation was created or acquired,"¹⁵ and "... be subject to such conditions as the Secretary ... [of Interior] shall deem necessary for the adequate protection and utilization of such reservation."¹⁶ (App. 381)

In addition, §10(e) requires licensees to pay a "reasonable annual charge" for the use of Indian lands, which charges are subject to periodic readjustment.¹⁷ (App. 382, 383)

Section 10(i) which permits the Commission to waive most conditions for a minor project like No. 176, does "not apply to annual charges for the use of Indian lands." (App. 384)

Finally, section 29 provides: "That all acts or parts of acts inconsistent with this Act are hereby repealed." (See App. 388.) The Court of Appeals' decision repeals *sub silentio* section 29, and returns this area of the law to the chaos that existed prior to the FPA, with each project having to fulfill separate require-

¹⁴In 1948 Congress reemphasized this decision when in passing the General Indian Right-of-Way Statute, 25 U.S.C. §§323-328 it specifically provided that the Act "shall not in any manner amend or repeal the provisions of the [FPA]." (25 U.S.C. §326)

¹⁵A Commission finding of "non-interference" is essential before issuance of an original license. (See *Federal Power Commission v. Tuscarora Indian Nation*, *supra*, 362 U.S. at 110-11.) Here, although not required by §15(a), the Commission also made such a finding in connection with its relicensing decision. (Opinion 36, App. 174, 176.)

¹⁶The Commission has always given great weight to the conditions "recommended" by Interior. (See *Pigeon River Lumber Co.* (1935) 1 F.P.C. 206, 209.) In relicensing Project 176 the Commission adopted all of Interior's conditions that were consistent with the Commission's overall obligations under §10(a). (Opinion 36, App. 143-55)

¹⁷The Commission has increased annual charges as conditions warrant. (See, e.g., *Montana Power Company v. Federal Power Comm'n* (1972 D.C. Cir.) 459 F.2d 863, *cert. denied* (1972) 408 U.S. 930.) Likewise in relicensing Project 176, the Commission has been generous. (See generally Opinion 36, App. 190-216, 232-45, 261-66; Opinion 36-A, App. 339-45)

ments and each potential licensee having to go to Congress to obtain its own private Act to authorize its project.¹⁸

C. The Commission Consistently Has Interpreted the Act as Not Permitting an Indian Veto¹⁹

From the beginning, the Commission has interpreted §4(e) as empowering it to grant rights-of-way across Indian reservations for a federal power project even if the Indians do not consent. (See *Pigeon River Lumber Co.* (1935) 1 F.P.C. 206 (lack of Indian consent does not prevent the Commission from issuing a preliminary permit for a project using tribal Indian lands)) This consistent and reasonable interpretation by the Commission of its own Act is entitled to great deference. (See, e.g., *American Paper Institute, Inc. v. American Electric Power Service Corp.* (1983) ____ U.S. ____, 51 U.S.L.W. 4547, 4552)

D. An Indian Veto Is Inconsistent With Other Decisions of This Court Which Have Denied States a Veto

By giving the Bands power to withhold their consent and thus veto a decision by the Commission to relicense a federal power project, the Ninth Circuit ignored the pervasive scheme of Congress for the nationwide development of power. Its holding conflicts with this Court's decision in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission* (1946) 328 U.S. 152, which interpreted Congress' intent in enacting the FPA. The Court there held that a State did not have a similar veto power over the licensing of a federal power project.

¹⁸Such private acts could, depending upon the "political muscle" of their sponsor, provide much less protection for the Indians.

¹⁹Although Congress amended §10(e) in 1935 to provide that certain tribes organized under the Indian Reorganization Act (25 U.S.C. §476) must approve annual charges in an original license, the Commission and Courts have denied those tribes a veto over any readjustment of those annual charges. (See, e.g., *Montana Paper Company v. Federal Power Comm'n* (1970 D.C. Cir.) 445 F.2d 739, 756, cert. denied (1971) 400 U.S. 1013 (Once having approved the annual charges in the original license, if dissatisfied with the readjustment decision "the only further recourse of . . . the tribe is the right of appeal."))

In *First Iowa*, the State intervened in Commission proceedings to license a major hydro-electric power project on the Cedar River in Iowa. The State argued that in addition to complying with the FPA, the license applicant had to comply with a State statute which required a permit to construct a dam on State waters. Although the Commission believed that the FPA superseded any State requirements, it dismissed the applicant's petition so the issue could be squarely presented to the Courts.

The District of Columbia Circuit affirmed, and the United States Supreme Court granted certiorari and reversed. Clearly recognizing the intent of Congress to vest in the Commission the responsibility over water-power development, it stated:

"To require the petitioner to secure a state permit . . . as a condition precedent to securing a federal license . . . would vest in the [State] a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the federal Act. It would subordinate to the control of the state the 'comprehensive planning' which the Act provides shall depend upon the judgment of the Federal Power Commission." (328 U.S. at 164)

The Ninth Circuit majority disagreed with the Commission "that section 8 of MIRA and the FPA conflict", and concluded the licensees for Project 176 must "both obtain a license from the Commission, and . . . the necessary right-of-way by the method provided in section 8 of MIRA". (692 F.2d at 1233, App. 21). As for such duplication of control between States and the Commission, the Supreme Court in *First Iowa*, wrote:

"A dual final authority with a duplicate system of state permits and federal licenses required for each project, would be *unworkable*." (328 U.S. at 168) (emphasis added)

The Indian veto created by the Ninth Circuit in this case will frustrate the purpose of Congress in exactly the same fashion as the State veto in *First Iowa*. In *First Iowa* the Court explained that the Congressional purpose was:

". . . to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the nation insofar as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of . . . other

federal laws previously enacted.” (*Id.* at 180)

In *Federal Power Commission v. State of Oregon* (1955) 349 U.S. 435, the Commission, over the objection of the State of Oregon, granted a license for a power project located on a federal reservation in that State. The Court again rejected dual control over federal power projects, stating:

“To allow Oregon to veto such use, by requiring the State’s additional permission, would result in the very duplication of regulatory control precluded by the First Iowa decision. [citation] No such duplication of authority is called for by the Act.” (*Id.* at 445)

Contrary to *First Iowa* and *State of Oregon*, the Ninth Circuit opinion gives a small California Indian band a veto which even the State of California does not have.

E. An Indian Veto Is Inconsistent With Other Decisions of This Court Which Have Authorized the United States and Its Licensees to Use Indian Lands Without Obtaining Indian Consent

From the beginning, Congress has possessed plenary authority to grant rights-of-way through Indian lands. (See, e.g., *Cherokee Nation v. Southern Kansas Railway Co.* (1890) 135 U.S. 641 (Congress authorized a railroad project through an Indian reservation even though it violated the treaty establishing the reservation)). Congress has undoubted authority to grant rights-of-way without specifically mentioning the Indian reservation in the Authorization Act. (See, e.g., *Spalding v. Chandler* (1896) 160 U.S. 394 (sustaining the power of the Government to convey a strip of land through a tract owned by an Indian tribe to one Chandler for the use of the State of Michigan in construction of a canal, even though the conveyance was in derogation of a treaty with the Indian tribe)).

In *Tuscarora*, *supra*, 362 U.S. 99, the Court also authorized the use of Indian fee lands for federal power project purposes, despite lack of Indian consent. The Court held that the Nonintercourse Act, 25 U.S.C. § 177, was not applicable to the United States or its licensee under the FPA (362 U.S. at 119-122).²⁰

²⁰MIRA section 8 does not apply to the United States or its licensees, but only to private parties. (See discussion at 8, *supra*)

F. An Indian Veto Imperils All Projects Located on Indian Lands

The Commission has licensed at least 35 projects that use Indian lands. (See note 12, *supra*) Each of these project licenses will have to be reexamined to ascertain if Indian consent is required under some pre-1920 statute, treaty or agreement.²¹

Like the scheme condemned by the Supreme Court in *First Iowa*, *supra*, the Ninth Circuit has created a "dual final authority" which is "unworkable" and has resorted to the "piecemeal, restrictive, negative approach" the FPA was to replace. To allow the Mission Indians a veto over Project 176 "would result in the very duplication of regulatory control" precluded by *State of Oregon*. The opinion also ignores the Supreme Court's holding in *Tuscarora* that within the FPA's "comprehensive plan, Congress intended to include lands owned or occupied by . . . Indians." Finally, it fails to give appropriate deference to the Commission's interpretation. (*Chemehuevi Tribe of Indians v. Federal Power Comm'n* (1975) 420 U.S. 395, 410)

II

PERMITTING INTERIOR TO VETO A COMMISSION RELICENSING DECISION IS CONTRARY TO CONGRESSIONAL INTENT, INCONSISTENT WITH LONG-STANDING ADMINISTRATIVE INTERPRETATION, CONFLICTS WITH OTHER DECISIONS OF THIS COURT AND JEOPARDIZES ALL PROJECTS ON FEDERAL RESERVATION LAND

Section 4(e) provides that an initial license "shall be subject to and contain such conditions as the Secretary of the Department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." (App. 383) The Ninth Circuit ruled that this section requires the Commission to include, without modification, In-

²¹Other acts requiring Indian consent are scattered throughout the uncodified statutes. (See, e.g., Act of February 10, 1891, 26 Stat. 745 (Use of Umatilla Reservation for canal purposes); Act of May 18, 1916, 39 Stat. 123, 157-58 (Lac Courte Oreilles tribe consent needed for use for storage reservoir purposes)).

terior's conditions in its relicensing decision. (692 F.2d at 1234-35, App. 25).

This ruling usurps the Commission's fact finding role by depriving it of the ability to rule on the "reasonableness" of Interior's conditions. Despite the Ninth Circuit's disclaimer²² (692 F.2d at 1235, App. 24-25), it gives Interior a veto over the relicensing authority of the Commission.

A. The FPA's Legislative History Supports the Independence of the Commission

In 1918, the Secretaries of War, Interior and Agriculture drafted a predecessor bill to the FPA. (H.R. 8716, 65th Cong. 2d Sess. (1918)) In a letter transmitting the bill and certain amendments to the special House committee on water power, the three Secretaries stated:

"The various establishments of the Federal Government which have had to do with the administration of water power should be coordinated through a single agency, and as far as practicable all agencies, federal, state, private, should be brought into cooperation. It is urgently recommended that a federal power commission be established as provided in the proposed bill and be given ample authority to undertake this work of preliminary investigations." (See *Chemehuevi Tribe of Indians v. Federal Power Comm'n* (1973 D.C. Cir.) 489 F.2d 1027, 1220-21) (emphasis added)

Thus from its inception the Commission was intended to be the single agency responsible for administering national water power development.

²²The Court's reasoning on the issue is unclear. After first ruling that Interior's conditions would be subject to review under the Administrative Procedure Act, 5 U.S.C. §§701-706 (1976), it later modified its opinion to delete reference to that Act. (701 F.2d at 827, App. 32-33)

While this leaves judicial review pursuant to § 313(b), it is unclear how this review would be accomplished. Since the Commission would be required to include the conditions without having to "find the facts," the "substantial evidence" provisions of 313(b) would be inapplicable. Would the parties then have the right to present direct evidence before the Court of Appeals? Would the matter be remanded to the Commission to take evidence that it was prohibited from taking into account in its licensing decision? The more one reflects the more unworkable the Court of Appeals solution becomes.

Although the Commission initially consisted of three Secretaries (War, Interior and Agriculture), Congress intended that none should have a veto. This intent became manifest in 1930 when the Commission was organized as a five-person body, independent from the Secretaries, with its own staff (Act of June 23, 1930, 46 Stat. 797). This is the Commission's current structure. (See §1)

B. The Commission Consistently Has Interpreted the Act as Not Providing Interior With a Veto²³

The Commission consistently has interpreted § 4(e) to require only those conditions which the Commission deems reasonable and in the public interest. (See *Pigeon River Lumber Co.* (1935) 1 F.P.C. 206, 209) (Commission, however, will "give great weight to judgment and recommendation of the custodian of the rights and welfare of the Indians"); see also, *Pacific Gas and Electric Co.* (1975) 53 F.P.C. 523, 526. (Commission refused to include conditions proposed by Secretary of Agriculture in relicensing decision noting that "while the Commission gives great weight to the judgment and recommendation of the Department . . . , the Commission nevertheless must act on the basis of the record as a whole and must exercise its judgment to insure that the project if licensed meets the requirement of Section 10(a) of the Act."))

This consistent and reasonable interpretation by the Commission of its own Act is entitled to great deference. (*American Paper Inst., Inc. v. American Electric Power Service Corp.*, *supra*, 51 U.S.L.W. at 4552)

C. An Interior Veto Is Inconsistent With Other Decisions of This Court

The reasoning of *First Iowa*, *State of Oregon*, and *Tuscarora*, denying vetoes to States and Indians applies *a fortiori* to a veto by Interior.

²³The Commission has also denied Interior a veto over the fixing of annual charges for the use of Indian lands under § 10(e). (See, e.g., *Montana Power Co. v. Federal Power Comm'n* (1971 D.C. Cir.) 459 F.2d 863, 874, *cert. denied* (1972) 408 U.S. 930 ("Secretary can refuse to approve the rate fixed by the Commission only by seeking court review of its determination."))

Such a veto is inconsistent with *Federal Power Commission v. Idaho Power Co.* (1952) 344 U.S. 17, 21, which held that a determination of whether the objectives of § 10(a) can be achieved in the absence of certain conditions is "an administrative not a judicial decision." The Ninth Circuit, however, relegates the Commission to a rubber stamp and arrogates fact-finding to itself.

D. A Secretarial Veto Is Inappropriate in a Relicensing Context

The FPA establishes two separate licensing schemes: (1) a procedure for initially licensing a new project (§4(e)), and (2) a procedure for issuing a new license after an original or prior license expires. (§15) (See *Pacific Gas & Electric Co.*, *supra*, 53 F.P.C. at 526 ("New licenses are issued under §15 rather than §4(e)."))

The reason Congress did not require section 15(a) licenses to meet section 4(e) requirements is obvious when one considers the practical distinctions between the two situations. When an applicant applies for an original license, there has not been a substantial financial investment and no consumer reliance on the project has developed. At that stage, if the Commission seeks to impose onerous conditions, the applicant can reject them and if the proposal interferes with a particular reservation, the project will not move forward. The situation on relicensing is quite different. In such a case, there has already been a finding that the project will not interfere with the reservation in question; the applicant has accepted the proposed conditions and built the project; the public has become dependent on its benefits; and the only real question is who should operate the project, the existing licensee, the United States or a competing applicant.

Since this is a relicensing case under §15(a) a Secretarial veto is inapplicable.²⁴

²⁴The Petitioners respectfully disagree with the Commission which held that §4(e) was applicable because the proceeding was "partly an initial licensing of the Henshaw facilities." (Opinion 36, App. 136) This is particularly true since no additional public lands or reservations are involved. All of the Henshaw lands are owned by Vista, except minor acreage under permit from Forestry.

E. A Secretarial Veto Is Particularly Inappropriate When Interior's Trust Responsibility Is Involved

During Commission proceedings the Bands and Interior argued that Interior had the absolute right to impose conditions and that because Interior was acting *solely* as trustee for the Indians, it did not have to propose reasonable conditions. (21 T.R. 4275-76; 29 T.R. 6132-33; 29 T.R. 6181) Interior's stance prompted the ALJ to ask if it really wasn't "a question of reasonableness, of being fair to all sides." (29 T.R. 6156) Interior's Associate Solicitor replied:

"[Interior's] trust responsibility to Indians . . . may preclude the kind of fairness, the kind of balancing of interests that normally goes on in the political process." (29 T.R. 6157)

Interior made no pretense of reasonableness, prompting the ALJ to state: "It is manifest the conditions were designed not to improve the project but to destroy it." (6 FERC ¶63,008, Initial Decision at 52) The ALJ concluded that "If [this approach] were to become the custom in other cases, the hydro power potentialities of the nation's many reservations [could not] contribute to the national need, nor [could] their avails be realized for the Indians' benefit." (*Ibid.*)

The Commission did not ignore Interior's proposed conditions; it gave substantial deference to them. (See note 16, *supra*) However, it did not consider itself bound to adopt Interior's conditions "exactly as propounded." (Opinion 36, App. 147)

Yet, despite their transparent unreasonableness, the Ninth Circuit now requires the Commission to include these conditions. Its decision threatens the viability of all projects which use Indian land.²⁵ For example, in *Tuscarora*, *supra*, the licensee was permitted to flood Indian lands. When that license expires Interior could require this Indian land to be "unflooded," and thus destroy the project.

²⁵Because §4(e) gives the same power to each "Secretary of the Department under whose supervision such reservation falls," such a veto power could also effect the viability of all projects located on federal reservation land.

The Ninth Circuit's holding also allows Interior to usurp the Commission's decision-making role under §10(a). Only applicants favored by Interior will be licensed. The Ninth Circuit's holding will undermine the most important role Congress gave the Commission—determining which project will best serve the *public* interest. (See §10(a), App. 382)

III

THE NINTH CIRCUIT'S HOLDING THAT "WATER RIGHTS" ARE A "RESERVATION" FOR SECTION 4(e) PURPOSES IS A STRAINED AND UNNECESSARY INTERPRETATION THAT JEOPARDIZES ALL FEDERAL POWER PROJECTS

The Ninth Circuit held that Interior's conditions also must be imposed with respect to the Indian reservations which "may be affected by the project." (692 F.2d at 1235, App. 25) The Court reached this remarkable conclusion by determining that Indian "water rights" are a "reservation" for the purposes of the FPA. Consequently a project that is 500 miles away from a reservation is "within" that reservation if it affects the reservation's water rights.

This interpretation of "reservation" is both strained and unnecessary. It is strained because it conflicts with both the clear language of the statute and the Commission's long-standing interpretation of it. It is unnecessary because Indian water rights are fully protected by other means.

A. The Ninth Circuit's Interpretation Is Inconsistent With Both the Statutory Language and the Commission's Long-standing Interpretation of It

Section 4(e) authorizes the construction of power projects "upon . . . reservations of the United States" and states that "licenses shall be issued *within* any reservation." (App. 381) (emphasis added) Section 3(2) defines "reservations" to include "tribal lands embraced *within* Indian reservations." (App. 380) (emphasis added)

The Court conceded "that the word 'within' tends to paint a geographical picture in the mind of the reader." (692 F.2d at 1236, App. 26) Certainly if Congress had intended the result that the Court strained to reach, it simply would have added the words

“or affecting” following the word “within.”

The Court’s definition of “reservation” also conflicts with *Tuscarora, supra*. In that case the Court stated that Congress:

“ ‘[F]or purposes of this Act’ ” (§3(2)), intended to and did *confine* “reservations,” including “tribal lands embraced within Indian reservations” (§3(2)), to those located on *lands* “owned by the United States” (§3(2)), or in which it owns a proprietary interest.” (362 U.S. at 114) (emphasis added)

Clearly the lands in question would have been “affected” by the Project, nevertheless they were not within the definition of “reservation” because they were owned “in fee” and not by the United States.

Here the situation is similar. There is no indication that Congress intended water rights to be a “reservation” within the meaning of the FPA. It is apparent that the “lands” and “interests in land” referred to were geographical in nature and not intended to include usufructuary water rights.

Recognizing the awkwardness of its interpretation, the Court purported to find “a possible ambiguity” in the statute that should be “resolved” in favor of the Indians. (692 F.2d at 1236, App. 27) Its interpretation, however, extends the FPA far beyond Congressional intent (See, e.g., *NAACP v. FPC* (1976) 425 U.S. 662), and ignores the Commission’s long-standing interpretation and application of the Act. (See, e.g., *Chemehuevi Tribe of Indians v. FPC* (1975) 420 U.S. 395, 410) Its interpretation also ignores the rule that statutes are not construed in favor of the Indians where they are intended to achieve other purposes and do not require Indian consent. (See *United States v. First National Bank* (1914) 234 U.S. 245, 259)

B. It Was Unnecessary for the Ninth Circuit to Distort the Meaning of the FPA in Order to Protect Indian Water Rights

The Court expressed concern that a project could turn “a potentially useful reservation into a barren waste without even crossing it in a geographical sense . . . [and would] not attribute to Congress . . . [such a] perverse and illogical intention. . . .” (692 F.2d at 1236, App. 28) This concern, however, is wholly

unjustified. For a project to have such dire consequences, the Commission would have to ignore the project's harmful effects²⁶ and the Courts would have to refuse to protect Indian water rights.²⁷ There is nothing in the history of this or any other federal water power project that would warrant such speculation.

The Commission has no power to adjudicate water rights (see §27, App. 387-88; see also *First Iowa*, *supra*, 328 U.S. at 175 (State water right laws are not superseded by the Federal Power Act)); nor is the Commission an appropriate forum for the resolution of water rights conflicts.

Although the Commission must require "satisfactory evidence" from an applicant that it has the right "to the appropriation, diversion, and use of water for power purposes. . . ." (§9(b)), protection of the right to "an allotment of water necessary to make the reservation livable," is a judicial function. (*State of Arizona v. State of California* (1983) — U.S. —, 51 U.S.L.W. 4325, 4328 (quoting from *State of Arizona v. State of California* (1963) 373 U.S. 546, 599-600); see *Winters v. United States* (1908) 207 U.S. 564; *Cappaert v. United States* (1976) 426 U.S. 128, 141.)

See also the McCarran Amendment, 43 U.S.C. §666, which permits joinder of the United States as a party to general stream adjudications; *Colorado River Water Conserv. Dist. v. United States* (1976) 424 U.S. 800, 819 (federal policy disfavors piecemeal adjudication of water rights)

C. The Ninth Circuit's Interpretation Jeopardizes All Federal Power Projects

The Ninth Circuit's sweeping definition of the word "reservation" exacerbates the problems created by its other holdings by making most federal hydro-electric projects subject to an In-

²⁶The Commission did not ignore the Pala, Pauma and Yuma Reservations. It required the licensees to fulfill all valid contracts to supply electric power and water to them. (Opinion 36, App. 219-21). The Commission also indicated that it might impose additional requirements consistent with the final disposition of the district court litigation. (Opinion 36-A, App. 334) See also Opinion 36, App. 190.

²⁷The water rights of all the parties are being adjudicated in the federal courts. (*Rincon Band et al. v. Escondido Mutual Water Co. et al.*, U.S. Dist. Ct., S.D. Cal. Nos. 69-217-S, 72-271-S, 72-276-S).

dian or Secretarial veto. As noted above, the Winters doctrine gives federal reservations reserved water rights. Because these water rights "may be affected" by a project located hundreds of miles away, almost every hydro-electric power project in the West could be "within a reservation" as the Ninth Circuit has defined the term. Therefore, each project could be subject to the same fatal requisites imposed by the Ninth Circuit. They either could be destroyed by the forced imposition of unworkable conditions by Interior or lie useless for lack of Indian consent. Clearly, the Ninth Circuit has in one decision frustrated the comprehensive Congressional purpose expressed in the FPA.

Conclusion

Petitioners urge that the opinion below conflicts with decisions of this Court, misinterprets legislative history, ignores consistent Commission interpretation of the FPA, and presents important issues which are ripe for disposition by this Court.

Dated: June 14, 1983.

Respectfully submitted,

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JUN 15 1983

ALEXANDER L. STEVAS,
CLERK

82 - 2056

No. ...

IN THE

Supreme Court of the United States

October Term, 1982

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCON-
DIDO and VISTA IRRIGATION DISTRICT,

Petitioners,

vs.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA AND PALA
BANDS OF MISSION INDIANS, and THE SECRETARY OF
INTERIOR in his capacity as trustee for said Bands,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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INDEX TO APPENDIX

	Page
Escondido Mutual Water Co. v. Federal Energy Reg- ulatory Comm'n (1982 9th Cir.) 692 F.2d 1223....	1
Escondido Mutual Water Co. v. Federal Energy Reg- ulatory Comm'n (1983 9th Cir.) 701 F.2d 826	31
Escondido Mutual Water Co., Project 176 et al. (1979) 6 FERC ¶61,189, 20 F.P.S. 5-614 (Opinion 36)	42
Escondido Mutual Water Co., Project 176 et al. (1979) 9 FERC ¶61,241, 19 F.P.S. 5-659 (Opinion 36-A)	310
Act of January 12, 1891, 26 Stat. 712 (Mission Indian Relief Act or MIRA)	379
Preamble	379
§ 2	379
§ 8	379
Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. § 791a, et seq. (Federal Power Act or FPA)	380
§ 3(2), 16 U.S.C. § 796(2)	380
§ 4(e), 16 U.S.C. § 797(e)	381
§ 10(a), 16 U.S.C. § 803(a)	382
§ 10(e), 16 U.S.C. § 803(e)	382
§ 10(i), 16 U.S.C. § 803(i)	384
§ 14, 16 U.S.C. § 807	384
§ 15(a), 16 U.S.C. § 808(a)	386
§ 15(b), 16 U.S.C. § 808(b)	387
§ 27, 16 U.S.C. § 821	387
§ 29, 16 U.S.C. § 823	388

**Escondido Mutual Water Co. vs.
Federal Energy Regulatory Commission,
692 F.2d 1223 (9th Cir. 1982).**

Escondido Mutual Water Company, City of Escondido, and Vista Irrigation District, Petitioners, v. Federal Energy Regulatory Commission, Respondent, San Pasqual Band of Mission Indians, Secretary of Interior, etc., et al., Intervenor.

San Pasqual, La Jolla, Rincon, Pauma and Pala Bands of Mission Indians, Petitioners, v. Federal Energy Regulatory Commission, Respondent, Escondido Mutual Water Company, City of Escondido and Vista Irrigation, District, Intervenor.

The Secretary of the Interior, acting in his capacity as trustee for the Rincon, La Jolla and San Pasqual Bands of Mission Indians, Petitioner, v. Federal Energy Regulatory Commission, Respondent, Escondido Mutual Water Company, City of Escondido and Vista Irrigation District, Intervenor.

Nos. 79-7625, 80-7012 and 80-7110.

United States Court of Appeals, Ninth Circuit. Argued and Submitted July 6, 1982. Decided Nov. 2, 1982. As Amended Feb. 23, 1983. As Amended on Denial of Rehearings March 17, 1983. See 701 F.2d 826.

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Colo., on brief, for San Pasqual, etc.

Joseph S. Davies, Jr., Joshua Rokach, FERC, Washington, D.C., argued, for respondent; John A. Cameron, Acting Asst. Sol., Kristina Nygaard, FERC, Washington, D.C., on brief.

Petition for Review of Orders of the Federal Energy Regulatory Commission.

Before ANDERSON, FERGUSON and NELSON, Circuit Judges.

FERGUSON, Circuit Judge:

This is a petition for review of decisions of the Federal Energy Regulatory Commission ("Commission")¹ in consolidated administrative proceedings involving licensed Project No. 176 in northern San Diego County, California. The project was originally licensed for 50 years in 1924 to the Escondido Mutual Water Company ("Mutual") pursuant to Part 1 of the Federal Power Act ("FPA"), 16 U.S.C. § 791a *et seq.* (1976). Since 1974, the project has been operated under annual licenses issued pursuant to section 15(a) of the FPA, 16 U.S.C. § 808(a) (1976). The proceedings now under review culminated in the issuance of a new 30-year license to Mutual, the City of Escondido ("Escondido"), and the Vista Irrigation District ("Vista").

The decision of the Commission to issue a new license to Mutual, Escondido, and Vista is reflected in its unreported Opinion No. 36, "Opinion and Order Issuing New Licenses, Determining Annual Charges for Past Periods, Prohibiting Certain Activities, Conditionally Providing Interim Operating Procedures, and Terminating Complaint and Investi-

¹The term "Commission" is used throughout this opinion to refer to the Federal Power Commission before October 1, 1977, and to the Federal Energy Regulatory Commission after that date. See 42 U.S.C. §§ 7172(a)(2), 7295(b) (Supp. IV 1980); 10 C.F.R. § 1000.1(d) (1982).

gatory Proceedings," issued February 26, 1979, and No. 36-A, "Opinion and Order on Rehearing Modifying Licenses and Stay, Determining Net Investment and Severance Damages, and Otherwise Denying Rehearing," issued November 26, 1979. Judicial review of these orders is sought by the Secretary of the Interior ("Interior"), Mutual, Vista, Escondido, and San Pasqual, La Jolla, Rincon, Pauma, and Pala Bands of Mission Indians ("Bands").

For the reasons given below, we reverse the Commission's decision and remand for further proceedings.

FACTS

The San Luis Rey River originates near Palomar Mountain in northern San Diego County, California. In its natural condition, it flows through the La Jolla, Rincon and Pala Indian Reservations, and then through the City of Oceanside on its way to the Pacific Ocean. Three other Indian reservations are also within the watershed of the San Luis Rey River — the Pauma, Yuima,² and approximately three-quarters of the San Pasqual. A map of the area and of Project No. 176, Appendix A of the Commission's Opinion No. 36, appears as Appendix I to this opinion.

The San Luis Rey River watershed is now and has historically been the homeland of the La Jolla, Rincon, San Pasqual, Pauma, Pala, and Yuima Bands of Mission Indians. These Indians were the object of Congress's special attention when it enacted, in 1891, the Mission Indian Relief Act ("MIRA"), 26 Stat. 712. Some of the concerns that led to the enactment of MIRA were expressed by the preceding Congress:

²The Yuima tracts are under the jurisdiction of the Pauma Band of Mission Indians. Consequently, while there are six reservations, there are five governing Indian bands.

The history of the Mission Indians for a century may be written in four words: conversion, civilization, neglect, outrage. The conversion and civilization were the work of the mission fathers previous to our acquisition of California; the neglect and outrage have been mainly our own. Justice and humanity alike demand the immediate action of Government to preserve for their occupation the fragments of land not already taken from them.

* * * * *

Much of the land is valueless without irrigation, and the Indians are being deprived of their water rights wherever and whenever the interests of the whites demand the appropriation of such rights.

S.Rep. No. 74, 50th Cong., 1st Sess. 1, 3 (1888).

Pursuant to the provisions of MIRA, the La Jolla, Rincon, San Pasqual and Pala Reservations were withdrawn from settlement and entry by order of President Harrison on December 29, 1891. Trust patents were issued on September 13, 1892, for the La Jolla and Rincon Reservations; on February 10, 1893, for the Pala Reservation; and on July 1, 1910, for the San Pasqual Reservation. The Pauma and Yuima Reservations were also established in accordance with MIRA through the acquisition of quitclaim deeds by the United States in 1891 and 1893. MIRA originally called for the land to be held in trust for 25 years, followed by the issuance of fee patents, but the periods of trust were later extended indefinitely.

Since 1895, the waters of the San Luis Rey River have been diverted out of the watershed to the community in and around the City of Escondido. The point of diversion has been located in the middle of the La Jolla Indian Reservation above all of the other reservations. The conveyance facility, known as the Escondido Canal, traverses parts of the La

Jolla, Rincon and San Pasqual Reservations, as well as some private lands and some federal land administered by the Bureau of Land Management. Its terminus is a storage facility known as Lake Wohlford.

Various agreements, dating back as far as 1894, among Mutual's predecessor, Interior, and the Bands purport to grant rights-of-way for the Escondido Canal across the various reservation lands in return for a guarantee to supply certain amounts of water to the Bands. The validity of those agreements is the subject of separate, currently pending litigation between Mutual and the Bands. *Rincon Band of Mission Indians, et al. v. Escondido Mutual Water Co., et al.*, S.D. Cal. Nos. 69-217-S, 72-276-S, 72-271-S. In a partial summary judgment in that action, certain portions of those agreements were declared void. *Id.* (January 10, 1980).

The diversion and conveyance facilities, including the diversion dam on the La Jolla Reservation, the Escondido Canal, and the various appurtenant roads, pack trails, power lines, telephone lines and the like, and two hydroelectric generating stations have been licensed to Mutual under Project No. 176 since 1924.

In 1922, Vista's predecessor constructed Henshaw Dam on the San Luis Rey River, approximately nine miles above Mutual's diversion dam. Pursuant to a complex contractual relationship, Vista and Mutual have shared the output of Lake Henshaw and the use of the Escondido Canal. Since 1925, approximately one-half of the water transported through the Escondido Canal and stored in Lake Wohlford has been delivered to the community in and around the City of Vista and the other half has been diverted to Escondido. The Henshaw facilities and water rights were not included in the original license for Project No. 176. Prior to 1979, Vista and its predecessors were not licensed by the Com-

mission or mentioned in the license.

Since 1925, Escondido and Vista have captured, impounded and diverted out of the watershed to Lake Wohlford approximately 90% of the flow of the San Luis Rey River at the diversion dam on the La Jolla Reservation. This amounts to an average of approximately 14,600 acre-feet per year. Natural flow accounts for only 2,705 acre-feet of the average annual diversion, the remainder consisting of water stored in Lake Henshaw, and water pumped from the groundwater basin above Lake Henshaw. Approximately 10% of the diverted flow, an average of 1,500 acre-feet per year, has been delivered to the Rincon Reservation pursuant to a 1914 contract entered into by Interior on behalf of the Rincon Band. No project water has been delivered to any of the other reservations. An average of approximately 2,200 acre-feet per year has flowed past the diversion dam, for one of two reasons: either the flows in the river have exceeded the capacity of the diversion facilities, or the facilities have been shut down for periodic maintenance and repair.

The Bands and Interior contend that the diversion of the San Luis Rey River water through Project No. 176 has substantially diminished recharge of the downstream Pauma, and Pala groundwater basins which underlie the Rincon, Pauma and Pala Reservations, and that as a result wells have gone dry and crops have been destroyed. The Bands and Interior also assert that "the future development of these reservations is dependent upon the utilization of these groundwater resources."³

³There was apparently no finding by the Commission or the A.L.J. with respect to these assertions. We express no view as to the degree to which they are supported by the record.

Between 1894 and 1957, the Bands received no compensation for the use of their lands or for the diversion of the river. Since 1957, the San Pasqual Band has received \$25 per year for the use of 3.08 acres of tribal lands licensed in that year.

PROCEEDINGS

On July 25, 1969, the Rincon and La Jolla Bands sued Mutual, Escondido, Interior, and the United States in the federal District Court for the Southern District of California. *Rincon Band of Indians v. Escondido Mutual Water Co.*, *supra*, Nos. 69-217-S, 72-276-S, and 72-271-S. The Bands sought (1) a declaratory order that various water and right-of-way agreements between Mutual, Vista and the Bands were void, (2) an injunction prohibiting the diversion of the San Luis Rey waters into the Escondido Canal, and (3) substantial damages. In January 1980, the district court granted partial summary judgment in favor of the Bands by voiding portions of the contracts. On April 18, 1980, this court denied petitions for interlocutory appeal filed by the parties.

In 1969 and 1970, Interior and the La Jolla, Rincon, and San Pasqual Bands filed complaints with the Commission, alleging that Mutual and Vista had violated the terms of the 1924 license. Among other things, they sought increased annual payments to the Bands throughout the term of the 1924 license. The Commission initiated an investigation, Docket No. E-7562, pursuant to § 306 of the Federal Power Act, 16 U.S.C. § 825e (1976).

In April 1971, Mutual filed an application, subsequently joined by Escondido, for a new "minor"⁴ hydroelectric

⁴Section 10(i) of the Federal Power Act, 16 U.S.C. § 803(i) (1976), allows the Commission to waive conditions in Part I of the Act for a complete project with not more than 2,000 horsepower capacity. Project No. 176, as licensed, falls below that limit.

license for Project No. 176, proposing to continue operating the project as it had during the original license period. In July 1971, the Commission initiated an investigation to consider the extent to which Vista was involved in the operation of Project No. 176 and in the occupancy of Indian lands or other lands of the United States (Docket No. E-7655).

In May and October 1972, Interior requested that the Commission recommend federal takeover of Project No. 176, after expiration of the original license, under section 14 of the Federal Power Act, 16 U.S.C. § 807 (1976). In June 1972, the La Jolla, Rincon, and San Pasqual Bands, acting pursuant to § 15(b) of the Federal Power Act, 16 U.S.C. § 808(b) (1976), applied for a non-power license, under the supervision of Interior, to become effective when the original license expired. This application was later joined by the Pauma and Pala Bands. Under both the federal takeover proposal and the Bands' application for a nonpower license, the licensed facilities would be used almost exclusively for agricultural and recreational development of the Reservations, not for the generation of electricity.

Lengthy hearings were thereafter held before an administrative law judge. He found that Project No. 176 was not constructed or operated for the purpose of generating electricity and that the Commission was therefore without jurisdiction to license it. Accordingly, he recommended dismissal of Interior's complaint, the Vista investigation, and all license applications, including Interior's recapture proposal. If this ruling had remained undisturbed, the consequence would have been that any rights-of-way purportedly conveyed by the original license would have reverted to the Bands once that license expired.

In February 1979, in Opinion No. 36, the Commission reversed the Initial Decision insofar as it dismissed new license applications, but affirmed that decision on the ter-

mination of Interior's complaint proceeding and the Vista investigation. The Commission held that Project No. 176 is subject to its licensing jurisdiction.

With regard to the past operation of Project No. 176, the Commission found that Mutual had violated the license by permitting Vista's joint use of project facilities and by diverting water stored in the Lake Henshaw reservoir owned by Vista and pumped from that reservoir through the Escondido Canal. Consequently, the Commission awarded readjusted annual charges to the La Jolla and Rincon Bands as of September 1969, and to the San Pasqual Band as of May 1970, in amounts based on the operations authorized by the 1924 license. The Commission held that any retroactive compensation for unauthorized use of reservation lands, however, had to be obtained in federal district court.

The Commission granted a new 30-year license authorizing use and control of the project by Mutual, Escondido, and Vista. It imposed conditions on the license which require the delivery of water to the La Jolla, Rincon, and San Pasqual Reservations for domestic, agricultural, and commercial uses. Those conditions were assertedly imposed to ensure that the project would not interfere or be inconsistent with the purpose for which these reservations had been created. No similar conditions were imposed with respect to the Pala, Pauma and Yuima Reservations because, although these reservations lie within the San Luis Rey River watershed below the intake of the Escondido Canal, and are thus affected by the diversion of water into Project No. 176, none of those reservations is traversed by the canal.

Among the conditions included in the new license for the benefit of the Bands are the following:

1. The license will include Vista's Lake Henshaw facilities and a "permanent water operating plan . . . for the

purpose of enhancing the existing fishery . . . and benefiting incidentally the Pauma and Pala Basins." The Commission asserts that this condition will assure, *inter alia*, an adequate water supply for the reservations.

2. The license is subject to reconsideration following the final disposition of the federal district court water rights litigation between the United States, Mutual, Vista and the Bands.

3. The license includes a formula determining annual charges for the use of lands within the La Jolla, Rincon, and San Pasqual Reservations, which, as modified by the Commission's opinion, awards approximately 11½ per cent of the project's net water conveyance benefits to the three reservations traversed by the canal. Also included is an additional annual charge to compensate the Rincon Band for the use of its land for generating power at the Rincon power plant.

4. The licensees are required to release water from the Escondido Canal, as ordered by the Commission, to an "Indian water service area" within the Indian reservations.

Pursuant to the duty imposed on him by section 4(e) of the FPA, 16 U.S.C. § 797(e) (1976), the Secretary of the Interior propounded a number of additional conditions to be included in the project license. The administrative law judge rejected the conditions on the ground they would "destroy the project." In its opinion, the Commission accepted some of the conditions but rejected or modified others because they would prevent the Commission from carrying out its licensing obligations.

In its November 1979 decision on Rehearing, Opinion No. 36-A, the Commission stayed the effective date of the new license for two years after the issuance of that opinion pursuant to section 14(b) of the FPA, 16 U.S.C. § 807(b)

(1976). It gave the licensees until six months after the effective date of the new license to submit exhibits reflecting inclusion of the Henshaw properties, facilities and water rights within the licensed project and providing for a proposed permanent operating plan for the project.

The Commission also, for the first time, determined the amount of Mutual's net investment and the severance damages to which it would be entitled in the event of either federal recapture or issuance of the nonpower license to the Bands. It found that the net investment has been fully depreciated and that there would be no severance damages because no electric utility properties of the licensee would be affected. Additionally, the Commission held that neither the United States nor any new licensees would be required to assume any of the licensee's contracts.

Finally, the Commission held that it had exclusive authority to issue right-of-way permits for the use of public lands for power project purposes. It concluded that section 501(a)(4) of the Federal Land Policy and Management Act, 43 U.S.C. § 1761(a)(4) (1976), did not require the licensees to obtain a right-of-way permit from the Secretary of the Interior.

All parties then filed petitions for review. No. 79-7625 was filed in this court on November 26, 1979 by Mutual, Vista, and Escondido. In it, the petitioners contend that the conditions imposed on the license are too stringent, and that the Commission's resolution of the annual charges, net investment and severance damages issues was unreasonably favorable to the Bands. No. 80-7012 was originally filed by the Bands in the United States Court of Appeals for the District of Columbia Circuit (D.C.Cir. No. 79-2397) on November 27, 1979. No. 80-7110 was originally filed by Interior in the D.C. Circuit on January 25, 1980 (D.C.Cir. No. 80-1111). The latter two petitions were transferred to

this court by a January 29, 1980 order of the D.C. Circuit. In them, the Bands and Interior contend, among other things, that the Commission lacked jurisdiction to license Project No. 176, that the license cannot be issued without the consent of the Bands, that the Commission is required to include in the license the conditions propounded by Interior, that the conditions imposed upon the license by the Commission do not adequately protect the Bands' interests, that the Commission cannot grant rights-of-way across nonreservation federal lands under the jurisdiction of Interior without Interior's consent, and that the license is inconsistent with the purposes for which the reservations were created. All three petitions were consolidated by order of this court filed May 14, 1980.

ISSUES

Of the numerous issues presented to us in the three petitions for review, we need only consider the following:

1. Does the Commission have jurisdiction to license Project No. 176?
2. Can the license be granted without the Bands' consent?
3. Can the license be granted without including all of the conditions propounded by Interior pursuant to the duty imposed upon it by section 4(e) of the FPA, 16 U.S.C. § 797(e) (1976)?

DISCUSSION

I. The Commission's Jurisdiction.

The Commission is authorized and empowered under the FPA to issue licenses

for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or

convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams or the bodies of water over which Congress has jurisdiction under its authority to regulate commerce.

Section 4(e) of the FPA, 16 U.S.C. § 797(e) (1976). At the same time, the FPA makes it unlawful "for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto . . . except under . . . a license granted pursuant to this chapter." Section 23(b) of the FPA, 16 U.S.C. § 817 (1976). The Bands and Interior contend that under these provisions the Commission's licensing authority extends only to projects the purpose of which is the development of electric power. They contend that Project No. 176 is not such a project. Alternatively they contend that the Commission's jurisdiction extends only to power components of projects with a primary purpose of diverting water, and with a secondary or incidental purpose of developing electric power.

The starting point for analysis is the observation that the primary purpose of Project No. 176 is not the development of power. The ALJ found that the project's "predominant and clearly defined purpose" is irrigation, not power production. The Commission agreed, stating that "the principal function . . . is to convey water," Opinion 36 at 95, and that "[t]he generation of electric power is and always has been incidental to the primary purpose of the project," Opinion 36—A at 27. Indeed, the ALJ found that the horsepower generated by the project is "not even the equivalent to that produced by half a dozen modern automobiles," and concluded, in determining that the Commission was without jurisdiction to license the project, that "the production of

power . . . can only be termed *de minimis* . . . especially in light of the miniscule amount of power produced, both in absolute terms and relative to other projects.”

Interior and the Bands do not contend that power generation must be the primary purpose of the project for the Commission to have jurisdiction. Such a contention would be wholly at odds with precedent. Rather, they contend that in this case the power generation aspect of the project is pure makeweight — that it is only included for the purpose of conferring jurisdiction on the Commission.

The Commission did not reach this question, relying instead on a very expansive reading of sections 4(e) and 23(b) of the FPA:

So long as any part of the project is situated on navigable waters, or on public lands or reservations, and so long as that project generates any electric power, however minor in amount and however insignificant to the project as a whole, and so long as interstate or foreign commerce is affected, the works of that project are subject to be licensed and required to be licensed under the Federal Power Act.

Opinion No. 36, at 37-39 (footnotes omitted).

We are required to give great deference to interpretations by administrative agencies of the statutes they are required to administer. *Investment Co. Institute v. Camp*, 401 U.S. 617, 626-27, 91 S.Ct. 1091, 1096-1097, 28 L.Ed.2d 367 (1971); *Sierra Club v. Andrus*, 610 F.2d 581, 602 (9th Cir. 1979), *reversed on other grounds*, 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981). This principle applies to an agency interpretation of the scope of its authorizing statute. *Peters v. Hobby*, 349 U.S. 331, 345, 75 S.Ct. 790, 797, 99 L.Ed. 1129 (1955); *Tennessee Valley Ham Co. v. Bergland*, 493 F.Supp. 1007, 1010 (W.D.Tenn.1980). The question before us, therefore, is whether the interpretation of

section 4(e) put forth by the Commission is a reasonable one.

The FPA empowers the Commission to license projects "for the development, transmission and utilization of power," section 4(e) of the FPA, and requires licenses to be obtained by persons who construct, operate, or maintain facilities "for the purpose of developing electric power," section 23(b) of the FPA. No explicit language in the FPA limits the Commission's jurisdiction to projects where the primary, or a major, or significant, or non-*de minimis* purpose is to generate power. Thus, the broad interpretation advanced by the Commission is not inconsistent with the plain language of the statute, even though that language might equally well have been subject to a narrower interpretation.

Nor did the Commission, by applying its broad interpretation of the jurisdictional statute to the facts of this case, act so unreasonably as to require reversal. This case, unlike one that might someday arise, does not squarely present the question whether the Commission could properly apply its broad jurisdictional formula to a case where the power elements of the project were included as "mere sham and make-weight." There was no such finding in this case, and we decline to make one ourselves at this stage of the proceedings. It suffices merely to note that there must be some point beyond which the mere presence of a power generating element in a much larger project aimed at a different goal could not reasonably be thought to confer jurisdiction on the Commission over the whole project. Where such a line ought to be drawn, in the first instance, is a question for the Commission rather than for this Court. We are not persuaded at this point in the proceedings that the line has been crossed in this case, and we therefore decline to overturn the Commission's assertion of jurisdiction.

Interior and the Bands also assert that at any rate the Commission's jurisdiction is limited to the "power components" of the project. We find no error in the Commission's conclusion, supported by the findings of the A.L.J., that all of the licensed facilities are "physical structures" which "are used and useful in connection with" the power elements of the project, and therefore within the scope of the Commission's jurisdiction. See section 3(11) of the FPA, 16 U.S.C. § 796(11) (1976).

II. *Indian Consent.*

As already noted, Project No. 176 involves various dams, ditches, flumes, powerhouses, and canals, which occupy parts of the Rincon, La Jolla, and San Pasqual Reservations. All three reservations were established pursuant to the provisions of the Mission Indian Relief Act of 1891 ("MIRA"). Section 8 of MIRA provides in pertinent part:

[P]revious to the issuance of a patent for any reservation as provided in section three of this act the Secretary of the Interior may authorize any citizen of the United States, firm, or corporation to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such reservation for agricultural, manufacturing, or other purposes, upon condition that the Indians owning or occupying such reservation or reservations shall, at all times during such ownership or occupation, be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior, and upon such other terms as he may prescribe . . . *Subsequent to the issuance of any tribal patent, or of any individual trust patent as provided in section five of this act, any citizen of the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and*

benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

(Emphasis added). The Bands and Interior maintain that under this section the Commission may not license those parts of Project No. 176 which occupy reservation land without the consent of the respective Indian Bands. The Commission disagrees.

A. Does Section 8 of MIRA Require Indian Consent?

Trust patents were issued on September 13, 1892, for the La Jolla and Rincon Reservations, and on July 10, 1910, for the San Pasqual Reservation. Thus, the relevant part of the statute is the latter part, which by its terms applies "[s]ubsequent to the issuance of any tribal patent." The language of the statute appears on its face to be comprehensive in prescribing the ways in which private parties can obtain rights-of-way for water projects across Mission Indian Reservations. Interior and the Bands contend that the statute means just what it appears to mean in this respect, and that it was not superseded, repealed, or limited by the congressional grant of licensing authority to the Commission under the FPA. The Commission contends, on the other hand, that § 8 of MIRA does not provide the exclusive means by which a private party can obtain such a right-of-way, or that if it does, it has been repealed implicitly to that extent by enactment of the FPA.

We begin analysis by considering the scope of MIRA as originally enacted. That question is illuminated by understanding the legal background from which MIRA emerged. Indian tribes generally possess sovereign power within their

reservations, including among other facets of self-government and territorial management the authority to control economic activity within their jurisdiction, and the power to exclude non-Indians from tribal lands. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 102 S.Ct. 894, 901, 71 L.Ed.2d 21 (1982). Similarly, it has long been held that a tribe's title to its lands cannot ordinarily be extinguished without tribal consent. See *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665, 99 S.Ct. 2529, 2536, 61 L.Ed.2d 153 (1979); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831).

Of course, the congressional power of eminent domain remains paramount, and can be exercised by Congress over tribal lands, just as it can be exercised over the lands of any private landowner within the jurisdiction of the United States. Congress can and often does delegate the power of eminent domain to various federal agencies. Ordinarily, however, it does not do so in the case of Indian lands; a special act of Congress is required when such lands are to be condemned. This point was highlighted recently when new regulations were proposed that would have given Interior the power to issue rights-of-way across certain tribal lands (not those involved in the instant case) without the Indians' consent. In commenting on these proposed regulations, the House Committee on Government Operations said:

Present law generally requires a special act of Congress to condemn tribal Indian land. If there are frequent instances of Indian tribes unreasonably refusing to consent to the Secretary's granting of rights-of-way over their land which are essential to the fulfillment of public purposes and the public welfare, then Congress might consider enacting legislation authorizing the person or agency seeking the right-of-way to institute a suit for condemnation thereof in a federal court.

H.R. Rep. No. 78, 91st Cong., 1st Sess. 9-10 (1969). With respect to the proposed regulations, the Committee said this:

The Committee believes that the Secretary's proposal for granting rights-of-way over tribal land without the consent of the tribe which owns it violates property rights, democratic principles, and the pattern of modern Indian legislation.

The Committee believes that the Secretary's assertion of power to act in disregard of his own regulation and issue rights-of-way over lands of tribes that have withheld their consent to such grants is contrary to law, as well as to good government, and should not be entertained.

Id. at 3-4.

These general principles are wholly consistent with Congress's purpose in including section 8 when it enacted MIRA, as the legislative origin of that section reveals. Shortly before the passage of MIRA, several irrigation companies sought rights-of-way across Indian land. Interior believed that the proposed irrigation ditches and flumes would benefit the Mission Indian Bands across whose lands they were to run. But Interior concluded that it was without power to grant the rights-of-way. That conclusion was based on an 1887 opinion of the Attorney General, which addressed the identical question. The Attorney General had said:

It is stated the diversion of the water and the right to dig the canal or ditch would be useful to the petitioners and beneficial in its effect to the Indians. These same facts exist in many cases where one man could use his neighbor's property with advantage both to himself and his neighbor; but still, as a rule, it is better to maintain the rights of property under the law.

Attorney-General Devens, in an opinion reported in 16 Opinions, page 553 (in which I concur), maintained

that the United States had power to grant such privileges as are asked for by the petitioner in this case; but the power to make the grant exists only in Congress, and without action by Congress it cannot be lawfully exercised.

18 Op. Att'y Gen. 563, 563-64 (1887).

In order to enable the Indians and the surrounding settlers to benefit from the construction of irrigation canals across reservation land, the Secretary of the Interior proposed that the pending legislation be amended to provide a mechanism for granting rights-of-way. The proposed amendment was identical to the later enacted section 8 except that it lacked the requirement that pre-patent grants guarantee a supply of water to the Indians for irrigation and domestic purposes. The proposed amendment was added to the bill as section 8 on the House floor. 22 Cong.Rec. 311-13 (1890). The Senate conferees agreed to the amendment with the addition of the requirement just mentioned, and with this modification, the bill enacting MIRA was passed.

The legislative history of section 8 makes clear that, at the time of its passage, Congress and Interior believed that federal agencies⁵ could not grant rights-of-way without specific authorization from Congress. In section 8, Congress carefully limited the scope of that authorization which it was willing to grant. Unless implicitly repealed by later legislation, section 8 represents the only way in which a private party may obtain a right-of-way across reservations created pursuant to MIRA.⁶

⁵Nor by the Indians themselves, since the United States held title to the lands. See 16 Op. Att'y. Gen. 552, 556-57 (1880).

⁶The Commission urges that section 8 of MIRA was not intended "to circumscribe the power of the United States, acting as sovereign, to dispose of public lands and reservations of the United States." We agree that it was not so intended. As we have explained, however, that sovereign power reposes in Congress, and may only be exercised by a federal agency to the extent of a specific congressional delegation. Section 8 of MIRA is thus not a limitation of the congressional power to dispose of reservation lands, but a carefully conditioned and circumscribed delegation of that power to Interior, and to the Bands themselves.

The Commission takes the position that section 29 of the FPA, 16 U.S.C. § 823 (1976), repeals section 8 of MIRA to whatever extent section 8 of MIRA comes into conflict with the Commission's asserted power to grant rights-of-way across reservations under its licensing authority. Section 29 provides, in pertinent part, that "[a]ll Acts or parts of Acts inconsistent with this Act are hereby repealed." However, the FPA explicitly requires the Commission, before issuing a license within any reservation, to find that "the licences will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." Section 4(e) of the FPA, 16 U.S.C. § 797(e) (1976). This requirement would be meaningless if Congress meant to extinguish preexisting Indian rights wherever they came into conflict with the Commissioner's comprehensive jurisdiction over power projects on federal lands. See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Comm'n*, 510 F.2d 198, 210-12 (D.C.Cir. 1975).

We do not agree with the Commission that section 8 of MIRA and the FPA conflict. Section 8 of MIRA defines the way in which any private entity can obtain a right-of-way across a reservation to which it applies. The FPA authorizes the Commission to issue licenses for the construction and operation of power projects. Where a project requiring a license under section 23(b) of the FPA crosses lands to which MIRA applies, the operator of that project is required both to obtain a license from the Commission, and to obtain the necessary right-of-way by the method provided in section 8 of MIRA.

Out of respect for Indian property rights, laws establishing and governing the reservations here involved were enacted.⁷

⁷When the Commission licenses a project crossing private lands, the licensee must obtain appropriate rights-of-way from the owners of those lands. This can be done by private negotiation or, failing that, through eminent domain. See section 21 of the FPA, 16 U.S.C. § 814 (1976). This simply recognizes that Congress did not intend to infringe property rights of private landowners in enacting the FPA. The property rights of Indian tribes within their reservations are of similar importance.

Without strong indications of congressional intent, we will not attribute to Congress a desire to abandon those principles, and repeal those laws, by enacting the FPA.

III. *The Rejection of Interior's Conditions.*

Section 4(e) of the FPA, 16 U.S.C. § 797(e), provides, in pertinent part, that

licenses issued within any reservation . . . shall be subject to and contain such conditions as the Secretary of the Department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

Id. It is not disputed that, with respect to the reservation lands involved here, the "Secretary of the Department under whose supervision such reservation falls" is the Secretary of the Interior. Pursuant to this section, Interior proposed a number of conditions to be placed on the license granted by the Commission. Many of these proposed conditions were rejected or modified by the Commission. We thus confront the issue whether the Commission violated section 4(e) by issuing a license "within Indian reservations" that neither "contained" nor was "subject to" some of the conditions which Interior "deemed necessary for the adequate protection and utilization of the reservation."

The language of the statute appears quite plain on its face. The license "shall include and be subject to" such conditions as Interior "deems necessary." The Commission contends, however, that it is not bound to accept Interior's conditions because section 10(a) of the FPA imposes upon the Commission a duty to exercise its independent judgment as to what conditions are "best adapted to a comprehensive plan for improving or developing a waterway, . . . for the improvement and utilization of waterpower development, and for other beneficial public uses." Section 10(a) of the

FPA, 16 U.S.C. § 803(a) (1976). The Commission construed the word "shall" in section 4(e) as merely requiring the Commission to "give great weight to the judgments and proposals of" Interior. Opinion No. 36 at 108. The Commission also noted that Interior had propounded conditions which were "deemed necessary" for all six Mission Indian reservations in the San Luis Rey River watershed. The Commission reasoned that Project No. 176 only occupies the lands of three of the reservations, although it indirectly affects the other three by reducing the flow of the San Luis Rey River, which passes through one of them and recharges groundwater basins beneath the other two. The Commission held that the license was "within" only the three reservations upon whose lands the canal lies, and that it was only with respect to the protection and utilization of these three reservations that Interior was authorized and required by Section 4(e) to propound conditions. We disagree with both of the Commission's conclusions.

A. The Commission Must Accept Interior's Conditions.

The plain language of a statute controls its interpretation. *Maine v. Thiboutot*, 448 U.S. 1, 4, 9, 100 S.Ct. 2502, 2504, 2506, 65 L.Ed.2d 555 (1980). Because the relevant portion of section 4(e) is plain, our inquiry as to its meaning is at an end unless there is other statutory language in conflict with it. In particular, the Commission's vigorous historical argument cannot move us to ignore the fact that section 4(e) says, quite simply, that the license "shall include" the conditions which the Secretary "deems necessary."

The Commission also contends, however, that the apparently plain meaning of section 4(e) is at odds with the duty imposed on the Commission by section 10(a) of the Act. These two sections, however, can easily be harmonized. Section 10(a) generally gives the Commission au-

thority to modify proposed projects before approval, so that they will be "best adapted to a comprehensive plan" for the utilization of waterways and the development of power. Section 10(a) of the FPA, 16 U.S.C. § 803(a) (1976). In the case of a project within a reservation, once the Secretary of the Interior has propounded those conditions deemed necessary for the protection and utilization of the reservation, the Commission is free to modify the proposal in other ways, but not by altering or omitting Interior's conditions, to make it feasible and beneficial to the public. If this cannot be done, the Commission may decline to issue a license at all. The fact that section 4(e) limits the Commission's authority under section 10(a) certainly does not render the two sections inconsistent. To conclude, as does the Commission, that the broad general authorization of section 10(a) is not only inconsistent with, but also overrides, the plain, specific limitation of section 4(e) is to ignore the most elementary canons of statutory construction. *See MacEvoy Co. v. United States*, 322 U.S. 102, 107, 64 S.Ct. 890, 893, 88 L.Ed. 1163 (1944) ("However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the enactment.' ").

The Commission urges that giving section 4(e) its literal meaning will place in the hands of Interior an "unconditional veto power" over the licensing authority of the Commission, unless the Commission itself can review Interior's determination as to what conditions are necessary. We need not decide whether, if this contention were true, it would affect our view as to the meaning of section 4(e). For it is clear that no such "unconditional veto power" is involved here. First of all, any license issued by the Commission which includes conditions propounded by Interior will be subject to judicial review under section 313(b) of the FPA, 16 U.S.C. § 825(b). Secondly, any failure by the Secretary

of the Interior to conform to the statutory standard in proposing conditions pursuant to section 4(e) will be reviewable as a final agency action under the applicable provisions of the Administrative Procedures Act, 5 U.S.C. §§ 701-706 (1976). The spectre of an unconditional veto power, with which an appointed public official could frustrate the public policies underlying the FPA, is illusory.

For these reasons, we conclude that section 4(e) of the FPA requires the Commission to include in any license "within a reservation" those conditions which the Secretary "deems necessary for the protection and utilization" of that reservation.

B. Project No. 176 Is Within All Six Reservations.

Project No. 176 lies partially within the geographical boundaries of three of the six reservations. There is no dispute as to whether the license is "within" those three reservations for purposes of section 4(e). Water rights of the other three reservations, the Pala, Pauma, and Yuima reservations, may be affected by the project, as they lie below the project in the San Luis Rey River watershed. The issue is whether or not the license is "within" these three reservations.

Section 3(2) of the FPA, 16 U.S.C. § 796(2)(1976), defines "reservation" as it is used in the FPA:

"[R]eservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws

....

Id. There can be no serious question that the water rights of the Pala, Pauma and Yuima Bands appurtenant to the

San Luis Rey River are "reservations" within the meaning of this definition. First of all, water rights are interests in land:

A water right is generally considered to be real property or "land." As Wiel says, "the right to the flow and use of water being a right in a natural resource, is real estate." A water right is real property for purposes of determining title in a quiet-title action, a mortgage recording requirement, satisfying the statute of frauds, descent and inheritance, and taxation.

1 R. Clark, ed., *Waters and Water Rights* § 53.1 at 345 (1967) (footnotes omitted). See *Hill v. Newman*, 5 Cal. 445 (1855); 1 Wiel, *Water Rights in the Western States* § 283 (3d ed. 1911). See also *Arizona v. California*, 373 U.S. 546, 596-97, 83 S.Ct. 1468, 1495-1496, 10 L.Ed.2d 542; *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 334 (9th Cir. 1956), cert. denied, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957). The Bands' water rights are owned by the United States. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 809-10, 96 S.Ct. 1236, 1242-1243, 47 L.Ed.2d 483 (1976); section 3 of MIRA. The Bands' water rights are reserved from private appropriation under the public land laws. *Cappaert v. United States*, 426 U.S. 128, 138-39, 96 S.Ct. 2062, 2069-2070, 48 L.Ed.2d 523 (1976); *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908). Thus, the Bands's water rights possess all of the elements of reservations as defined in section 3(2) of the FPA.

The Commission draws our attention to the fact that section 4(e) applies to licenses issued *within* reservations. It must be conceded that the word "within" tends to paint a geographical picture in the mind of the reader, and its presence in the statute lends support to the Commission's narrower view of Interior's duty and authority under section

4(e). We are thus confronted with a possible ambiguity on the face of the statute.

“[S]tatutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.” *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918), *quoted in Bryan v. Itasca County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976). Although the FPA was not enacted primarily for the benefit of dependent Indian tribes, it is obvious that the ambiguous language of section 4(e) now under consideration was included by Congress for that precise purpose, and that the canon of statutory construction just mentioned should therefore apply to it. It is equally obvious from the plain language of the FPA that Congress intended to limit and circumscribe the broad authority granted to the Commission to issue licenses in the public interest, by requiring those licenses not to be detrimental to the interests of Indians on reservations. There is no guarantee, of course, that the tribal interests which the United States has a fiduciary duty to protect and defend will coincide with the interest of the public at large. A water and hydropower project might be vastly beneficial to the public in general, for instance, even though by inundating an entire reservation it might be utterly inimical to the interests of the Indians whose reservation is concerned. We find in the plain language of the FPA a policy to foster the development of water power projects in the public interest, to the extent, and only to the extent, that such can be done without abandoning the fiduciary duties owed by the United States to dependent Indian tribes.

A water project may occupy a geographical portion of an Indian reservation without impinging in any serious way on Indian interests—e.g., by crossing a corner of the reservation with a power line or an access lane. Conversely, a

project may turn a potentially useful reservation into a barren waste without ever crossing it in the geographical sense—e.g., by diverting the waters which would otherwise flow through or percolate under it. We will not attribute to Congress, on account of the mere presence in its enactment of one ambiguous word, the perverse and illogical intention of guarding carefully against the former danger while openly embracing the latter. It is the necessary implication of the Commission's narrow construction of section 4(e) that Congress had just such an intent.

For all these reasons, we are compelled to reject the Commission's conclusion that its duties under section 4(e), including the duty to accept the Secretary of the Interior's proposed conditions, and its duty to make findings as to whether the license is consistent with the reservations' purpose, apply to only the La Jolla, Rincon, and San Pasqual reservations. We hold, rather, that those duties exist also with respect to the Pala, Pauma, and Yuima Reservations.

CONCLUSION

Because the Commission has erred in its construction and application of section 4(e) of the FPA in this matter, a remand for further consideration is necessary. Interior's proposed conditions will have to receive a different treatment, consistent with the conclusions expressed in this opinion, in any further proceedings. Furthermore, as we have explained, no license issued by the Commission will, in and of itself, give any licensee a right-of-way across any reservation created pursuant to MIRA. We decline to overrule the Commission's conclusion that the licensing of Project No. 176 is within its statutory jurisdiction.

A number of other issues were presented in the petition for review in this matter. In view of our conclusions ex-

pressed above, it would be inappropriate for us to reach those issues at this point in the proceedings.

REVERSED AND REMANDED.

**Escondido Mutual Water Co. vs.
Federal Energy Regulatory Commission,
701 F.2d 826 (9th Cir. 1983).**

Escondido Mutual Water Company, City of Escondido, and Vista Irrigation District, Petitioners, v. Federal Energy Regulatory Commission, Respondent, San Pasqual Band of Mission Indians, Secretary of Interior, etc., et al., Intervenor.

San Pasqual, La Jolla, Rincon, Pauma and Pala Bands of Mission Indians, Petitioners, v. Federal Energy Regulatory Commission, Respondent, Escondido Mutual Water Company, City of Escondido and Vista Irrigation District, Intervenor.

The Secretary of the Interior, acting in his capacity as trustee for the Rincon, La Jolla and San Pasqual Bands of Mission Indians, Petitioner, v. Federal Energy Regulatory Commission, Respondent, Escondido Mutual Water Company, City of Escondido and Vista Irrigation District, Intervenor.

Nos. 79-7625, 80-7012 and 80-7110.

United States Court of Appeals, Ninth Circuit. March 17, 1983.

Paul D. Engstrand, Leroy A. Wright, San Diego, Cal., James C. Kilbourne, Washington, D.C., Robert S. Pelcyger, Boulder, Colo., argued, for petitioners; Jennings, Engstrand & Henrikson, Glenn, Wright, Jacobs & Schell, San Diego, Cal., C. Emerson Duncan, II, Duncan, Allen & Mitchell, Washington, D.C., on brief, for Escondido; Fredericks & Pelcyger, Boulder, Colo., on brief, for San Pasqual, etc.

Joseph S. Davies, Jr., Joshua Rokach, FERC, Washington, D.C., argued, for respondent; John A. Cameron, Acting Asst., Sol., Kristina Nygaard, FERC, Washington, D.C., on brief.

ORDER on PETITIONS FOR REHEARING

Before ANDERSON, FERGUSON and NELSON, Circuit Judges.

In these consolidated cases, petitions have been filed as follows:

1. A petition for rehearing and a suggestion for rehearing en banc filed December 20, 1982 by the Escondido Mutual Water Company, City of Escondido and Vista Irrigation District;
2. A petition for rehearing filed December 20, 1982 by the Secretary of the Interior;
3. A petition for rehearing filed December 16, 1982 by the San Pasqual, La Jolla, Rincon, Pauma and Pala Bands of Mission Indians;
4. A petition for rehearing filed December 23, 1982 by the Federal Energy Regulatory Commission.

In response to the petition for rehearing by the Federal Energy Regulatory Commission, the language in the panel opinion of November 2, 1982, in the middle of the first column of 5123 of the slip opinion, 692 F.2d 1223 at p. 1235, which states as follows:

First of all, any license issued by the Commission which includes conditions propounded by Interior will be subject to judicial review under section 313(b) of the FPA, 16 U.S.C. § 8251(b). Secondly, any failure by the Secretary of the Interior to conform to the statutory standard in proposing conditions pursuant to section 4(e) will be reviewable as a final agency action under the applicable provisions of the Administrative Procedures Act, 5 U.S.C. §§ 701-706 (1976). The spectre of an unconditional veto power, with which an appointed public official could frustrate the public policies underlying the FPA, is illusory.

has been amended to read as follows:

Any license issued by the Commission which includes conditions propounded by Interior will be subject to judicial review under section 313(b) of the FPA, 16 U.S.C. § 825/(b). The spectre of an unconditional veto power, with which an appointed public official could frustrate the public policies underlying the FPA, is illusory.

With that amendment to the opinion, Judges Ferguson and Nelson have voted to deny all the petitions for rehearing and to reject the suggestion for rehearing en banc.

Attached hereto is a statement of Judge Anderson. Judge Anderson would grant and deny the various petitions for rehearing as stated in his concurring and dissenting statement.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R.App.P. 35.

The petitions for rehearing are denied and the suggestion for a rehearing en banc is rejected.

J. BLAINE ANDERSON, Circuit Judge, concurring and dissenting:

I concur in denial of the petitions for rehearing filed by the Secretary of Interior and the San Pasqual, La Jolla, Rincon, Pauma and Pala Bands of Mission Indians ("Bands"). For the following reasons, however, I dissent from denial of the petitions for rehearing filed by Escondido Mutual Water Company, City of Escondido, Vista Irrigation District ("Licensees"), and the Federal Energy Regulatory Commission ("FERC"). Except for the reservations expressed below, I continue to concur in the majority opinion.

I. INDIAN CONSENT

A. *Mission Indian Relief Act*

Petitioners persuasively argue that our opinion misinterprets § 8 of the Mission Indian Relief Act ("MIRA"). 26 Stat. 712 (1891). Section 8 provides in pertinent part:

Subsequent to the issuance of any tribal patent, . . . any citizen of the United States, firm, or corporations may contract with the tribe, band, . . . for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

We interpreted § 8 as the exclusive means by which a private party may obtain a right-of-way across reservations created pursuant to MIRA. *Escondido Mutual Water Co. v. Federal Energy Regulatory Commission*, 692 F.2d 1223, 1231-34 (9th Cir.1982). Our interpretation necessarily implies that the Bands, by withholding consent, can completely bar the licensing of a federal power project. Our interpretation further provides no recourse to the proposed licensee if Indian consent is arbitrarily or improvidently withheld. Upon reconsideration, I believe our interpretation of § 8 conflicts with the Federal Power Act's ("FPA") pervasive scheme for obtaining rights-of-way over tribal lands.

The opinion relies heavily on legislative history which I believe is rather weak support for our sweeping holding. The 1969 House Committee Report, 692 F.2d at 1232, says nothing more than that a federal agency exceeds its authority if it grants rights-of-way without congressional delegation. The 1887 Attorney General opinion, *id.* at 1232-33, is merely an example of that proposition; an administrative agency (Interior) to whom Congress had not delegated power to grant rights-of-way. That opinion may have led to MIRA § 8, but the legislative history bears no indication that Congress intended § 8 as the exclusive means of obtaining rights-of-way. In 1891, perhaps contractual negotiation was the only means thought necessary to obtain rights-of-way from Mission Indians, especially given that the Attorney General

opinion addressed a water project concededly beneficial to the Indians. More probably, however, Congress simply gave no thought to the eminent domain matter; contractual negotiation resolved the immediate problem.

A farther-sighted Congress subsequently enacted the FPA. In it, Congress recognized that contractual means may sometimes fail to obtain rights-of-way necessary to a federal power project. Section 21, for example, provides an alternative to the contractual process by delegating to licensees of federal power projects the power of eminent domain. FPA § 21, 16 U.S.C. § 814. Though that condemnation power is inapplicable to reservations held in trust by the United States, § 21, may be applied to Indian lands held in fee. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960).¹

The FPA employs a different and much more protective scheme for acquiring the use of tribal lands within Indian reservations. Unlike privately owned property which may be utilized as required, FERC, under FPA § 4(e), 16 U.S.C. § 797(e), may license the use of tribal lands within an Indian reservation only upon a finding "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." Even then, the license is subject to terms and conditions which the Secretary of Interior shall deem necessary for the adequate protection and utilization of the reservation. *Id.*

Moreover, unlike privately owned property which a licensee may condemn outright under § 21, tribal lands within an Indian reservation may be used only upon payment of

¹In *Tuscarora*, the Supreme Court recognized that to subject trust reservation land to condemnation would amount to the sovereign condemning its own property. 362 U.S. at 113-14, 80 S.Ct. at 551-52, 4 L.Ed.2d at 594-95.

an annual rental charge. FPA § 10(e), 16 U.S.C. § 803(e). The rental charge is subject to approval "of the Indian tribe having jurisdiction of such lands" as provided in § 16, 25 U.S.C. § 476, of the Indian Reorganization Act. I believe Congress intended FPA §§ 4(e) and 10(e) to be the counterparts in the tribal land sector to FPA § 21 in the private land sector.

The majority acknowledges that Congress may exercise the condemnation power over tribal lands and may pass legislation delegating to a person or agency seeking a right-of-way that condemnation power. 692 F.2d at 1232. The majority and I disagree on the extent to which such an act of Congress must refer specifically to Indians. *Tuscarora* teaches that meticulous specificity is unnecessary. In responding to the Tribe's argument that § 21 of the FPA could not apply to Indian lands because it did not specifically mention them, the Court observed, "it is well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." 362 U.S. at 116, 80 S.Ct. at 553, 4 L.Ed.2d at 596.

Even if a special act of Congress is necessary, I cannot conceive of a more direct and specially-tailored scheme for appropriation of Indian lands than the FPA. *Tuscarora*, although addressing the somewhat novel issue of Indian lands held in fee, says as much:

The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. See § 4(e). It neither over-

looks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians — “tribal lands embraced within Indian reservations.” See §§ 3(2) and (10)(e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians.

362 U.S. at 118, 80 S.Ct. at 554, 4 L.Ed.2d at 597.

Legislative history of the FPA is also at odds with our opinion. In 1920, an amendment to the Water-Power bill (the FPA's predecessor) was proposed that would prohibit the issuance of any license affecting tribal lands within Indian reservations, except by and with consent of the tribal council. The Senate conferees rejected the amendment, seeing “no reason why water-power use should be singled out from all other uses of Indian reservation land for special action of the council of the tribe.” H.R.Rep. No. 910, 66th Cong., 2d Sess. 8 (1920). In the face of this compelling legislative history, and upon reconsideration of the FPA's many provisions addressed directly to Indians, I can no longer adhere to our prior conclusion that MIRA § 8 is the exclusive means by which rights-of-way for FPA licensed projects over Mission Indian land can be obtained.

B. Indian Reorganization Act

Section 16 of the Indian Reorganization Act (“IRA”), 25 U.S.C. § 476, contains a sweeping provision pertaining to Indian property rights:

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in land, or other tribal assets without

the consent of the tribe; and to negotiate with the Federal, State, and local Governments.

In order for an Indian tribe to enjoy the powers and benefits conferred by § 16, it must organize and operate under a constitution that is "ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation . . ." *Id.* The constitution must then be approved by the Secretary of the Interior. *Id.* Because the San Pasqual Band adopted a constitution pursuant to IRA, we must decide whether § 16 prevents an FPA licensee from obtaining rights-of-way absent Indian consent. I would hold it does not.

The purposes of IRA § 16 were twofold. First, the section was designed to encourage Indians to revitalize their self-government by establishing a basis for the adoption of tribal constitutions. *Fisher v. District Court*, 424 U.S. 382, 387, 96 S.Ct. 943, 946, 47 L.Ed.2d 106, 111 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152-52, 93 S.Ct. 1267, 1272-73, 36 L.Ed.2d 114, 120-21 (1973). Second, the section was one important element of an overall statutory scheme designed to put an end to piecemeal legislation authorizing sale of Indian lands and to allotment of tribal lands to individual members of a tribe. 78 Cong.Rec. 11123. See F. Cohen, *Handbook of Federal Indian Law* 516-17 (1982 ed.). The legislative history does not reveal Congress' intent, in enacting IRA § 16, to supplant the federal government's power to dispose of or reclassify the use of its own property. As Cohen concludes, "Congressional power to extinguish Indian ownership by plain and specific legislation is plenary, so long as Congress compensates the tribes for the abrogation of recognized title as required by the Fifth Amendment." *Id.* at 517. For the same reasons as discussed in the preceding section under MIRA, I conclude that § 16 of IRA is not the exclusive means for ob-

taining rights-of-way by FPA licensees.

Certainly, contractual negotiation and agreement of the parties is the preferred method of acquiring rights-of-way across Indian lands. But failing consent, I believe §§ 3(2), 4(e), and 10(e) of the FPA are express congressional authority for acquiring such property. Substantial protections for existing Indian property rights are built into FPA § 4(e), which requires that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." The majority recognized that after imposing certain conditions regarding delivery of water, FERC made the § 4(e) finding. 692 F.2d at 1228. I would grant the Licensees' and FERC's petition for rehearing, and on rehearing, I would focus specifically on the definition of reservation "purpose" and the extent to which FERC's § 4(e) finding was supported by substantial evidence and I would so find and affirm. *Cf. Note, Tribal Consent and the Lease of Indian Lands for Federal Power Projects*, 59 Minn.L.Rev. 385, 416-19 (1974) (suggesting a broad definition of reservation "purpose").

II. INTERIOR'S CONDITIONS

As previously indicated, § 4(e) of the FPA provides that licenses issued within any reservation are subject to those terms and conditions which the Secretary of Interior deems necessary for the adequate protection and utilization of the reservation. 16 U.S.C. § 797(e). Holding these conditions mandatory on FERC, our opinion reasons that § 4(e) does not vest Interior with an "unconditional veto power" over FERC's licensing authority because (1) licensing proceedings are subject to judicial review in the court of appeals, and (2) conditions imposed by Interior are final agency action under the Administrative Procedure Act reviewable in the district court. 692 F.2d at 1235.

Disregarding for the moment our conclusion that judicial review minifies the veto power, our reasoning was unsound. Section 313(b) of the FPA, 16 U.S.C. § 825l(b), vests exclusive jurisdiction in federal courts of appeal to determine on review of a licensing proceeding whether statutory standards have been satisfied. *City of Tacoma v. Taxpayers*, 357 U.S. 320, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958). Conditions imposed by Interior under § 4(e) must necessarily be among those reviewable standards because they constitute an integral part of the final licensing decision. It was not the intent of Congress to fragment review of a final FPC order from review of a secretary's statutory duties under the FPA. See *State of North Carolina v. Federal Power Commission*, 393 F.Supp. 1116 (M.D.N.C. 1975) (action to enjoin FPA licensee pending the Secretary of Interior's finding that the license would not adversely impact a waterway designated under the Wild and Scenic Rivers Act; the district court dismissed, citing FPA § 313(b) as the exclusive avenue for review). Such bifurcation of review conflicts with the law of this circuit, that "Congress may select the forum in which review may be had and special statutory review procedures take precedence over whatever nonstatutory review might otherwise be available in the district court." *Nevada Airlines, Inc. v. Bond*, 622 F.2d 1017, 1020 (9th Cir. 1980); *UMC Industries, Inc. v. Seaborg*, 439 F.2d 953, 955 (9th Cir. 1971).

In light of the foregoing precedent, I join in modification of this portion of the opinion on denial of rehearing. The larger issue, however, is whether our conclusion — that conditions imposed by Interior under § 4(e) are mandatory on FERC — should remain intact.

All parties agree the Secretary may not fix conditions impossible of fulfillment and thus block the use of all tribal land. His determinations are tested by reasonableness; that

is, he may impose conditions *reasonably* deemed "necessary for the adequate protection and utilization of such reservation." I agree conditions imposed by the Secretary are mandatory on FERC to the extent they are reasonable; the crucial issue is which forum — the Secretary of Interior, FERC, or the reviewing court — is to decide reasonableness.

I would place the initial reasonableness decision on FERC, for it is, after all, the forum in which the initial factfinding function is vested. FPA § 4, 16 U.S.C. § 797. See *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 620 (2d Cir.), *cert. denied*, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1965) ("The Commission has an affirmative duty to inquire into and consider" all facts relevant to the decisionmaking standards imposed by the statutory scheme.). FERC's written findings of fact and supporting reasoning would then be subject to review in the court of appeals. I believe this procedure would preserve the control of FERC over licensing, and at the same time respect the Secretary's statutory duty to protect the reservations. I would, therefore, conclude that the FERC properly interpreted and applied § 4(e) and that all of its findings in that regard are supported by substantial evidence.

I would also sustain the FERC's findings and conclusions denying a retroactive remedy for annual charges to 1924. These are damages traditionally awarded by a court for unlawful trespass. The FERC has no statutory or common law authority to consider and assess damages in this case. It was correct in so holding.

Federal Energy Regulatory Commission

Opinion No. 36

Issued February 26, 1979.

United States of America Federal Energy Regulatory Commission.

Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith, Georgiana Sheldon, Matthew Holden, Jr., and George R. Hall.

Escondido Mutual Water Company; City of Escondido, California; and Vista Irrigation District¹. Project No. 176; Docket No. E-7562.

Secretary of the Interior Acting in His Capacity as Trustee for the Rincon, La Jolla and San Pasqual Bands of Mission Indians v. Escondido Mutual Water Company and City of Escondido, California; Vista Irrigation District; San Diego Gas & Electric Company. Docket No. E-7655; Project No. 559.

OPINION NO. 36

**OPINION AND ORDER ISSUING NEW LICENSES,
DETERMINING ANNUAL CHARGES FOR PAST
PERIODS, PROHIBITING CERTAIN ACTIVITIES,
CONDITIONALLY PROVIDING INTERIM
OPERATING PROCEDURES AND TERMINATING
COMPLAINT AND INVESTIGATORY PROCEEDINGS
(Issued February 26, 1979)**

APPEARANCES

H. Gregory Austin, Reid Peyton Chambers, Harold A. Ranquist, Charles E. O'Connell and Earle D. Goss on behalf of the Secretary of the Interior

¹The caption is enlarged in view of the addition herein of new licensees.

Arthur J. Gajarsa on behalf of the San Pasqual Band of Mission Indians

Robert S. Pelcyger, L. Graeme Bell, III, Barbara Fix, Bruce R. Green, Don B. Miller, Barbara E. Karshmer and Terry L. Singleton on behalf of the Rincon, Pala, Pauma, La Jolla Bands of Mission Indians; also *Donald L. Scoville* for the Pala Band

Robert L. Woods on behalf of the Staff of the Federal Power Commission

Paul D. Engstrand, Jr., Donald R. Lincoln and C. Emerson Duncan, II on behalf of the City of Escondido, California, and Escondido Mutual Water Company

Leroy A. Wright on behalf of Vista Irrigation District

Denis Smaage on behalf of California Department of Fish and Game

Vincent P. Master, Jr. on behalf of the San Diego Gas & Electric Company

James A. Burke on behalf of Uhllein Hansen

AN OVERVIEW

In the 1890's Escondido Irrigation District constructed a conduit within San Diego County, California, to carry water for domestic and irrigation use from the San Luis Rey River, through the surrounding mountains and out of the river's watershed to the City of Escondido (Escondido). In 1915 and 1916 Escondido Irrigation District's successor, Escondido Mutual Water Company (Mutual), installed facilities to utilize the water to generate electric power at two locations along that man-made waterway.

Because of those generating facilities, Mutual, in 1921, applied under the Federal Water Power Act of 1920 for a license which would include that portion of its overall water and water power project which extended from the point of

diversion of the San Luis Rey waters into the conduit, to the point of discharge of some of those waters through the tailrace of the second powerhouse along that waterway, known as Bear Valley powerhouse. The Federal Power Commission, in its records, designated that portion of Mutual's overall project as its Project No. 176. Mutual amended its application in 1924, and promptly thereafter the Commission² issued a 50-year license authorizing Mutual to construct³, operate and maintain the facilities or works of Project No. 176.⁴ Although the license expired on June 24, 1974, Mutual has continued to operate and maintain the project under annual licenses issued pursuant to Section 15(a) of the Federal Power Act.⁵

The consolidated proceeding designated by the captioned dockets includes a joint application of Mutual and Escondido⁶ for a new 50-year license for Project No. 176 and a competing application of five Bands of Mission Indians (Bands)⁷

²The term "Commission" refers to the Federal Power Commission in contexts prior to October 1, 1977, and to the Federal Energy Regulatory Commission in contexts on and after that date. See Sections 402(a)(2) and 705(b) of the Department of Energy Organization Act, 42 U.S.C. §§ 717(a)(2) and 7295(b), and the joint regulation entitled "Transfer of Proceedings to the Secretary of Energy and the Federal Energy Regulatory Commission", 10 CFR § . . .

³The dam at an impoundment downstream from the conduit which is now known as Lake Wohlford was then being reconstructed and elevated in height.

⁴See Appendix A which shows the principal places and facilities discussed herein.

⁵The Federal Water Power Act was reenacted in 1935 as Part I of the Federal Power Act.

⁶Escondido acquired approximately 90% voting control of Mutual in 1970 and proposes to combine its water distribution system with Mutual's water conveyance system as soon as it may lawfully do so.

⁷The Bands consist of the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians. Mutual's conduit diverts the San Luis Rey waters within the La Jolla Indian Reservation and occupies portions of that reservation and the Rincon Indian Reservation, both of which are wholly within the watershed of that river; the San Pasqual Indian Reservation, which is partly within that watershed; and other Federal lands. The Pala and Pauma (including for all purposes of this proceeding the Yuima) Indian Reservations are also within that watershed downstream from the diversion point on the La Jolla Indian Reservation.

for a nonpower license under Section 15(b) of the Federal Power Act.⁸ Although the Secretary of the Interior (Interior) supports the Bands' application for a nonpower license, Interior advocated initially and now advocates alternatively that the United States take over, or "recapture", part of the project pursuant to Section 14 of the Federal Power Act.⁹

Docket No. E-7562 within this consolidated proceeding involves a 1970 complaint against Mutual and Escondido in which Interior charged on behalf of the La Jolla, Rincon and San Pasqual Bands¹⁰ that Mutual violated its license, and requested injunctive relief, damages, revocation of the license and a retroactive redetermination and assessment of the annual charges of \$25. Docket No. E-7655 is a 1971

⁸Section 15(b) provides, in pertinent part,

"[T]he Commission, on its own motion or upon application . . . after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or any part of the project works for nonpower use. . . . Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. . . ."

⁹Section 14 provides, in pertinent part,

"(a) Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain any project or projects . . . covered in whole or in part by the license. . . .

"(b) . . . In any relicensing proceeding before the Commission any Federal department or agency may timely recommend . . . that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if it does not itself recommend such action . . . shall upon motion of such department or agency stay the effective date of any order issuing a license . . . for two years after the date of issuance of such order. . . ."

¹⁰As noted, Mutual's conduit occupies portions of the reservations of the particular Bands.

investigation under Section 4(g) of the Federal Power Act¹¹, among other provisions, into the possible unlawful joint use and control of the works of Project No. 176 by Vista Irrigation District (Vista), which owns and operates Lake Henshaw, the only impoundment on the San Luis Rey River, located nine miles upstream from Mutual's diversion point. And Project No. 559 involves a non-controversial application of San Diego Gas & Electric Company (SDG&E) for a new license for a 2.4-mile primary transmission line running from the first powerhouse along the conduit, known as the Rincon powerhouse, to a point of interconnection with SDG&E's distribution system.

Subject to a possible two year stay of the effective date of a new license mandated by Section 14(b) of the Federal Power Act, we are issuing a 30-year license to Mutual, Escondido and Vista¹² to operate and maintain Project No. 176, including Vista's Henshaw Dam, Lake Henshaw and the related lands, facilities and water rights. Furthermore, we are prohibiting modifications to Henshaw Dam and appurtenant facilities pending our further order, and are providing for water to the La Jolla, Rincon and San Pasqual

¹¹Section 4 provides, in pertinent part,

"The Commission is hereby authorized and empowered—

* * *

"(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, state or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water power resources of the region."

¹²Although Vista has not filed an application to become a joint licensee of Project No. 176 with Mutual and Escondido, Vista has indicated its willingness to accept such a status, and neither Mutual nor Escondido has indicated any opposition.

Bands in the event of a stay of the effective date of the new license. We are also issuing a 30-year license to SDG&E to continue to operate and maintain its Project No. 559 transmission line, and amending Mutual's 1924 license for Project No. 176 to fix and readjust annual charges.

GEOGRAPHIC, HISTORIC AND PROCEDURAL HIGHLIGHTS

Geographic

The San Luis Rey River is a non-navigable¹³ waterway which rises in mountainous terrain in northern San Diego County, California, and flows in a westerly direction some 65 miles into the Pacific Ocean. Its watershed occupies an area of approximately 565 square miles, of which 203 square miles lie upstream from Henshaw Dam and 32 square miles lie between Henshaw Dam and the point of diversion into the conduit.

The San Luis Rey watershed is characterized as semi-arid and has an average annual rainfall of 21 inches at Henshaw Dam. Nearby, Escondido has an average annual rainfall of 16 inches and Vista, only 13 inches. The rainfall throughout the watershed and in nearby areas is heaviest from November through April and virtually nonexistent during June, July, August and September. As a result of these and other conditions the river's flow is sporadic and intermittent, and it is normally dry for several months of the year.

Lake Henshaw is a shallow reservoir which experiences a high degree of evaporation¹⁴ as a combined result of climatic conditions and the fact that it has a large surface area in relation to its depth. While it is the only surface water

¹³It is so stipulated and, therefore, no issues of navigability are involved herein.

¹⁴Lake Henshaw experienced an evaporation loss of 36.8% during its first 51 years of operation.

impoundment on the San Luis Rey River, three ground water basins lie under the river in the area under consideration: The Warner Basin underlies Lake Henshaw and its headwaters, and has been pumped since 1950 to augment the natural flows into Lake Henshaw. Downstream, the Pauma Basin underlies the Rincon and Pauma Indian Reservations and is separated by the Pauma Narrows, which is an impermeable formation, from the Pala Basin. The latter underlies the Pala Indian Reservation and extends westward to the Monserate Narrows. All of the ground water basins are recharged through rainfall and seepage from the river flows and irrigation.

Although in the past up to 200 acres of the La Jolla Indian Reservation have been irrigated from tributaries of the San Luis Rey River, that 8,332 acre reservation has never been irrigated from the river itself. And in recent years, less than 15 acres have generally been under irrigation. On the other hand, the San Luis Rey River upstream from Mutual's intake is utilized by the La Jolla Band and others as a recreational fishery, where the La Jolla Band maintains two campgrounds. Because the river normally is dry during the summer, its use as a fishery is enhanced by continuous releases of stored and/or pumped water from Lake Henshaw.

Prior to 1913 the Rincon Band irrigated their reservation by means of ditches from the San Luis Rey River. Between 1913 and 1916 Interior constructed irrigation facilities consisting of pipelines and wells on the Rincon Indian Reservation, and in the latter year Mutual completed the installation of its Rincon powerhouse. The Rincon Band was thereby provided water through the Rincon tailrace and/or electric power to operate irrigation wells for 575 acres of their 4,057 acre reservation. A pipeline from the tailrace crossed the San Luis Rey River to a booster pump which made the water available to all irrigable parts of the res-

ervation. But the pipeline deteriorated and is now used to convey water across the river to irrigate lower lying lands or to discharge the water into the river and/or its tributaries where the flows percolate into the Pauma Basin. In recent years, not more than 200 acres of the Rincon Indian Reservation have been under cultivation.

The San Pasqual Indian Reservation obtains water for domestic purposes from Valley Center Municipal Water District or from private wells. There is no irrigated farming on the 1,380 acre reservation, and it does not receive water from the San Luis Rey River or the Escondido Canal.¹⁵

Historic

In the early 1890's Escondido Irrigation District and the Rincon Band of Mission Indians filed certain notices under California law to appropriate water from the San Luis Rey River. Thereafter, Escondido Irrigation District was granted a right-of-way for its proposed conduit¹⁶ under the terms of a purported agreement dated June 4, 1894, with Interior acting on behalf of the La Jolla Band of Mission Indians, in which Escondido Irrigation District agreed to

“furnish at its own expense and at such places or points along said flume or canal within said reservation and within the Rincon reservation and at and during such times and periods of time as the Indians on said res-

¹⁵Some residents along the conduit siphon water through garden and similar hoses.

¹⁶The right-of-way appears to have been limited to the La Jolla Indian Reservation. Apparently, Escondido was granted a right-of-way through the Rincon Indian Reservation under the terms of a similar agreement dated March 19, 1897, which was found to be defective in its execution and/or detrimental to the Indians. There is no right-of-way agreement, as such, through the San Pasqual Indian Reservation since the trust patent for that reservation was not issued until 1910. In any event, Interior apparently granted a right-of-way across all three reservations in or about 1910.

ervations may desire . . . an ample supply and quantity of water for the use of said Indians for agricultural and for domestic purpose and for stock belonging to said Indians."¹⁷

As the conduit was originally constructed, water was diverted through a small tunnel in one bank of the river¹⁸ and flowed almost 15 miles by gravity through a series of wooden flumes (some of which were hung by cables from bluffs) and earthen canals which were cut into and wound their way through the mountains, into a small creek and then a reservoir which are now known as Bear Valley Creek and Lake Wohlford, and then on to Escondido. The conduit came to be known as the Escondido Canal, and portions were reconstructed from time to time so that it is now 13.5 miles long and consists of a 112-foot long concrete diversion dam with a 16-foot crest, and a series of tunnels, metal flumes, concrete canals and a 2,156-foot long 42-inch pipe known as Hellhole Siphon.¹⁹ The Escondido Canal right-of-way occupies the following lands:²⁰

¹⁷The purported agreement also provides,

"That the right to the free use of a sufficient quantity of water from the flume or canal of said company as hereinbefore stipulated shall continue and be in force so long as the Indians shall reside upon the said reservations. . . ."

¹⁸The diversion was assisted in periods of low flow by temporary dams of rock, gravel and brush which were washed away by the next high flow.

¹⁹Hellhole Siphon replaced a section of the Escondido Canal in the vicinity of Hellhole Creek and operates as an inverted siphon by dropping the water down the side of a mountain and carrying it across a valley and up the side of another mountain to a point on the Escondido Canal which is 15 feet below the point of the drop.

²⁰The figures are those proposed in Mutual's application for a new license and exceed those under Mutual's current license by about 100 acres. They include acreage occupied by the conduit, access trails and roads, telephone lines, intake works, a caretaker's area and the works associated with the Rincon powerhouse.

La Jolla Indian Reservation	— 24.65 acres
Rincon Indian Reservation	— 26.56 acres
San Pasqual Indian Reservation	— 36.18 acres
Indian Subtotal	— 87.39 acres
Other United States lands	— 225.08 acres
United States Subtotal	— 312.47 acres
Private lands	— 43.85 acres
Escondido Canal Total	— 356.32 acres

And Lake Wohlford occupies an additional 843 acres (of which 181 acres are United States lands), bringing the total acreage of Project No. 176 to 1,199.32.

The Escondido Canal was placed into operation in 1895. A decade later Escondido Irrigation District failed, and Mutual was organized in 1905 to succeed to its interests.²¹

Beginning in 1911, William G. Henshaw (Henshaw) posted notices under California law to impound the headwaters of the San Luis Rey River within Warner's Ranch²²,

²¹Mutual's Articles of Incorporation state that it was formed "To supply . . . water for any or all beneficial uses; secondarily and incidentally, to develop water power and to apply the same to the generation of electric power for any and all beneficial uses . . ."

²²Title to the 43,402 acre Warner's Ranch (or Warner Ranch, as it is sometimes called) originates in a Mexican grant and was upheld against claims of prior occupancy by Mission Indians in *Harvey v. Barker*, 126 Cal. 262 (1899), affirmed, *Barker v. Harvey*, 181 U.S. 481 (1901), wherein the Supreme Court said, 181 U.S., at page 491,

"There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by an action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its power of disposal."

In or about 1904 the Mission Indians who were removed from Warner's Ranch were settled in or near the Pala Indian Reservation.

Barker was described in *United States v. Title Insurance and Trust Company*, 265 U.S. 472 (1924), as a "rule of property" deciding title issues which "should no longer be considered open."

which he owned, and to divert the waters so impounded. On June 21, 1912, Mutual and Henshaw entered into an agreement under which Mutual consented to the construction and maintenance of a dam across the San Luis Rey River on Warner's Ranch, and the consequent impoundment and diversion of San Luis Rey waters, and Henshaw agreed that Mutual was entitled to receive an annual flow of 4,143 acre-feet at the intake of the Escondido Canal consisting of the sum of (a) the natural inflows between the proposed dam and the intake, and (b) any amounts which would have to be released from the proposed dam from November 1 through July 1 each year to bring those inflows up to the lesser of (i) 4,143 acre-feet, or (ii) the natural flow at the intake without the proposed dam.²³

On February 2, 1914, Mutual entered into a purported agreement with Interior acting on behalf of the Rincon Band of Mission Indians which modified the purported agreement of June 4, 1894, insofar as it pertained to the Rincon Band, authorized the construction of a power plant on the Rincon Indian Reservation, and provides,

"It is mutually understood and agreed that the Rincon Indians herein mentioned are entitled to the flow of the San Luis Rey River up to a maximum of six cubic feet per second.

"It is further mutually understood and agreed that the United States, for and on behalf of said Rincon Indians, has reserved for their use and disposition, and shall reserve for their use and disposition, in any agreement relating to the water flowing or to flow in the San Luis Rey river, a minimum flow of six cubic feet of water per second of time, measured at or near the intake of

²³According to a 1922 report to the Federal Power Commission, Mutual diverted an average of 4,344 acre-feet of water from 1896-97 through 1920-21.

the canal of the Escondido Mutual Water Company, and, in extremely dry years, a minimum flow of three cubic feet of water per second of time for the months of July, August, and September of each such extremely dry year. The flow of water so reserved shall be carried in the ditch of the Escondido Mutual Water Company and delivered by said Company to said Indians at the power plant to be constructed . . . and any water not needed or to be needed by said Indians shall be subject to the use and disposition of the Escondido Mutual Water Company for any purpose whatsoever. . . ."

The purported agreement provides, additionally, for rights-of-way and for selling electric power to the Rincon Band,

"said current to be constantly available whenever required for pumping water, so that when the pumped water is added to the water which passes through the power plant, said Indians will have all the water needed for their use, not to exceed six cubic feet per second. . . ."

Mutual completed the construction of its Bear Valley powerhouse in 1915, installing two 120 KW generators under an operating head of approximately 400 feet²⁴, and its Rincon powerhouse in 1916, installing two 120 KW generators under an operating head of about 800 feet²⁵, and began serving electric power.²⁶ The Federal Water Power Act was enacted in 1920 and, as indicated, Mutual filed an

²⁴Mutual enlarged its Bear Valley powerhouse and installed a 280 KW generator in 1928, bringing Mutual's total generating capacity to 760 KW.

²⁵Most of the water released at the Rincon penstock is utilized to generate electric power at the Rincon powerhouse. The water which is discharged through the Rincon tailrace and the small amount which bypasses the powerhouse is then delivered to the Rincon Band.

²⁶In 1954, however, Mutual sold its electric distribution facilities to SDG&E, and thereafter delivered electric energy only to that company — about 95% — and the Rincon Band — about 5%.

application in 1921 to license the works of its water and water power project from the intake tunnel on the San Luis Rey River to the tailrace of the Bear Valley powerhouse.

The Federal Power Commission initiated an inspection of Mutual's facilities. In May 1922 the U.S. Geological Survey submitted its report, indicating that Mutual's facilities were "[p]ractically the only irrigation development of any magnitude" in the area, and stating,

"The water supply available for the project of the Escondido Mutual Water Company is limited to the natural flow of San Luis Rey River and the capacity of the diversion canal. The company has no storage works on the main stream, the amount of water stored in [Lake Wohlford] being that which the company is able to divert through its 15 mile conduit leading from the river.

* * *

"It should be kept in mind that the use of water for power by the Escondido Mutual Water Company is secondary and subordinate to its use for irrigation purposes."

The U.S. Geological Survey advised the Commission that Henshaw was then currently proposing to dam the river at Warner's Ranch²⁷ and recommended, first, that Henshaw be requested to file an application for a license, and second, that consideration of Mutual's application be deferred so that the two applications could be considered together.

On June 5, 1922, the Commission wrote to Henshaw inquiring as to the status of the dam and advising him of the licensing requirements. Henshaw's agent replied on July 21, 1922, to the effect that the development of power had not definitely been decided upon, and, "When we have

²⁷Construction of the dam was begun in April or May 1922.

reached some conclusion we expect to make a formal application to your Bureau for permit and rights-of-way."

On June 28, 1922, Henshaw entered into an agreement under which Interior, acting on behalf of the Rincon and Pala Bands, agreed not to oppose the construction of his dam and the resulting impoundment and diversion of San Luis Rey waters. The agreement acknowledges that the Rincon Band has

"a prior first right to the normal flow of the said San Luis Rey River to the extent of the first six second feet of water naturally flowing in said river at the intake of the Escondido Mutual Water Company's canal,"

and that the Pala Band has

"a prior first right to the normal flow of the said San Luis Rey River to the extent of the first six second feet of water naturally flowing in said river, at the point where it crosses the eastern boundary line of said Pala Indian Reservation. . . ."

The agreement defines "natural flow" as the amount of water actually entering the impoundment added to the amount of water produced by the watershed between the dam and the intake of Mutual's canal. And it provides that if the watershed between the dam and the intake fails to produce water in the quantities to which the Rincon Band is entitled, then Henshaw

"will deliver or cause to be delivered, at his expense and without cost to said Indians, at the aforesaid intake of the Escondido Mutual Water Company's canal, water, in such quantities and at such times as will, with the water, if any, then in said river at said intake, produce the natural flow up to 6 second feet; provided that [Henshaw] shall not be obliged at any time to liberate from [his] reservoir any greater quantity of

water than shall at the time be flowing into it."²⁸

With respect to the Pala Band, the agreement provides that if the San Luis Rey waters available for their use fall below the quantity required by them, then Henshaw

"agrees at his own expense and without cost to the Indians of said reservation to sink such wells, install such pumps, motors, pipes, pipelines, fittings, appliances, material and supplies . . . as may be necessary to furnish the Indians of the said Pala Reservation with the quantity of water for irrigation purposes to which they are entitled not exceeding a maximum of six cubic feet per second."²⁹

A month later Henshaw incorporated San Diego County Water Company³⁰ which is Vista's immediate predecessor and succeeded in September 1922 to his water rights as well as his interests in Warner's Ranch and the agreement of June 28, 1922. On November 10, 1922, San Diego County Water Company entered into an agreement with Mutual³¹

²⁸Henshaw also agreed therein that if the level of Well No. 1 on the Rincon Indian Reservation is not as high as the bottom of the nearby San Luis Rey River bed on May 1st of each year, he would do one of several things, at his option—and the particular option selected has been to furnish power without cost to the Rincon Band "to satisfy their requirements of water for domestic and irrigation purposes during the months of May to October, inclusive, of any such year."

²⁹Henshaw also agreed to operate and maintain the wells at his own expense, and that the "installation of each and every part" would be subject to the approval of the Pala Band.

³⁰Its Articles of Incorporation state that it was formed, among other purposes, to construct, operate and maintain plants for the generation and distribution of electricity, and dams and reservoirs for impounding, storing and distributing water "for irrigation, domestic and all other uses and purposes. . . ."

³¹The agreement indicates that if Henshaw Dam was constructed to impound 200,000 acre-feet of water, as it later was, the annual runoff from the San Luis Rey watershed was estimated to yield 28,000 acre-feet for irrigation or 24,750 acre-feet for domestic use. In fact, the runoff averaged 25,218 acre-feet during Henshaw Dam's first 28 years of operation and only 6,878 acre-feet during its next 23 years of operation (during which period the Warner Basin was pumped).

The agreement also indicates that it was contemplated that Henshaw-impounded water would be used to generate electric power.

in which

A. San Diego County Water Company agreed to sell and deliver at Mutual's intake, and Mutual agreed to purchase and take, perpetually, 2,500 acre-feet of water at a price of \$15 per acre-foot, of which 500 acre-feet are to be delivered each June, July, August and September and 250 acre-feet each October and November (and, at Mutual's option, an additional 2,500 acre-feet upon the same terms)

B. Mutual granted to San Diego County Water Company rights to utilize perpetually up to two-thirds of the carrying capacity of the Escondido Canal to Lake Wohlford, to store water in Lake Wohlford to the extent of any unused and unnecessary capacity of Mutual, and to discharge waters from Lake Wohlford; and San Diego County Water Company agreed to pay \$10,000 annually for such rights.

C. Mutual agreed with San Diego County Water Company that the Escondido Canal would be operated and maintained by a "superintendent" to be selected by the two of them (but removed by either of them), and that the superintendent's annual budget (including his salary and "also plans and estimates for any reconstruction work or betterments which in his judgment may be required") would be subject to their joint approval. Operating and maintenance expenses would be shared in proportion to their respective volumes of water carried in the conduit during the preceding year.

D. Mutual agreed to construct a new outlet from Lake Wohlford which would be large enough for Mutual's and San Diego County Water Company's waters, the cost to be shared equally.

E. San Diego County Water Company agreed to enlarge the Escondido Canal from a capacity of about 40 cfs to 70 cfs, to line the canal and to construct Hellhole Siphon, the

cost to be borne two-thirds by San Diego County Water Company and one-third by Mutual.

F. For the asserted purpose of satisfying the Rincon Band's water rights, San Diego County Water Company agreed to maintain a continuous flow of 6 cfs at Mutual's intake from January through June each year, releasing such amounts not exceeding the inflow into Lake Henshaw as would bring the "amount naturally flowing at said intake" to 6 cfs, and Mutual agreed to deliver from July through December each year the amounts specified in the purported agreement of February 2, 1914.

Henshaw Dam was completed in December 1922. As raised in 1927, it occupies 1.91 acres of the Cleveland National Forest and could impound approximately 194,323 acre-feet of water (inundating 17.4 acres of the Cleveland National Forest). But such storage was never attained, and no water has passed over its spillway. Lake Henshaw reached a maximum volume of about 180,000 acre-feet in 1943; but only eight years later its storage waters were depleted to zero or near zero as the result of a drought. Beginning in 1951 the runoff from the San Luis Rey watershed into Lake Henshaw has generally been augmented by pumping the underlying Warner Basin; and Lake Henshaw has remained under 20,000 acre-feet continuously, except for brief periods in 1952, 1958, 1966, 1968-9 and 1978.³²

³²Commissioner Hall and three aides involved in preparing this Opinion and order inspected Lake Henshaw on June 1, 1978, following the heaviest or near-heaviest Winter rainfall on record, at which time Lake Henshaw was said to contain more than 30,000 acre-feet of water. But, because of seismic conditions Vista was required by the California Department of Water Resources, Division of Safety of Dams, to evacuate Lake Henshaw to 10,000 acre-feet and is required to hold it at that level until appropriate modifications are made to comply with current safety standards.

In 1923 Escondido acquired from Mutual and began to operate the portion of Mutual's water distribution system which was then within Escondido's boundaries, but Escondido remained dependent upon Mutual to supply it with water from the San Luis Rey River.

Mutual refiled its application for a license on January 19, 1924, indicating as it had in 1921 that the source of its water supply was the San Luis Rey River.³³ But Mutual added that the capacity of its conduit was being enlarged from 42 second feet to 70 second feet, that the enlarged conduit would be used for the transmission of Mutual's waters as well as those of San Diego County Water Company, and that "the joint waters of the two companies, conveyed through the intake conduit, shall be used to generate power at the new project powerhouse, the power or proceeds therefrom to be pro-rated according to respective ownership of the water passing through the plant."³⁴ That powerhouse was never constructed.

By letter dated February 26, 1924, O. C. Merrill, Executive Secretary of the Federal Power Commission, tendered to Mutual a draft of a proposed license which provided in Article 22 that Mutual would

"retain the possession of all property . . . including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and . . . none of such properties will be sold, transferred, abandoned, or otherwise disposed of with-

³³Mutual said, among other matters, "The project does not involve the construction of any dam or dams across the San Luis Rey River, the source of water for the project."

³⁴The Escondido Canal ordinarily is closed for maintenance work during each October, November and/or December, the exact periods varying from year to year. Scheduled maintenance and unscheduled repairs are significant as to both cost and the continuity of the service in view of the rugged terrain in which most of the conduit is situated.

out the approval of the Commission.”

By letter dated April 7, 1924, Mutual advised Mr. Merrill of its agreement with San Diego County Water Company and inquired whether it conflicted with Article 22. On April 16, 1924, Mr. Merrill asked for a copy of that agreement. And by letter dated May 2, 1924, he acknowledged receipt of a copy of “ ‘Agreement between San Diego County Water Company and Escondido Mutual Water Company dated May 10, 1922’ ”³⁵ and advised Mutual,

“I would state that a study of this agreement indicates that you retain full ownership and control of the property so far as necessary to comply with the requirements of a license issued under authority of the Federal Water Power Act, and that there appears to be no grounds for conflict with article 22 of the license in question (Project No. 176).”

The license was issued on June 25, 1924; and a year later, in June 1925, Mutual began to receive Henshaw-stored water which it had purchased from San Diego County Water Company under the agreement of November 10, 1922. And eight months later, in February 1926, Vista (which had been organized in 1923) began to receive Henshaw-stored water which it purchased from San Diego County Water Company under a contract dated October 2, 1924.

In the meanwhile, on March 5, 1925, the Federal Power Commission issued a minor part license to a predecessor of SDG&E to construct, operate and maintain 2.4 miles of primary 88 KV transmission line and a 40-foot right-of-way from the Rincon powerhouse, across the Rincon Indian Reservation and to another licensed primary transmission line,

³⁵It is assumed that Mr. Merrill was furnished a copy of the agreement of November 10, 1922, since San Diego County Water Company had not been incorporated on May 10, 1922.

which minor part was designated as Project No. 559. Although that 50-year license, as subsequently amended, expired on March 4, 1975, annual licenses have been issued pursuant to Section 15(a) of the Federal Power Act.

In 1928, pursuant to the agreement of November 10, 1922, Mutual and San Diego County Water Company constructed a concrete diversion dam some 150 to 200 feet upstream from Mutual's diversion tunnel.³⁶ The dam was described in a 1929 letter from Interior's Supervising Engineer as "an impervious concrete structure extending to bed rock and thereby intercepting the underground flow and cutting off all supply to the lower canals [presumably of the Rincon and Pala Bands] from this source."

In 1928 the Bear Valley powerhouse was enlarged and a third (280 KV) generator was installed.³⁷ In connection therewith, and pursuant to the agreement of November 10, 1922, Mutual and San Diego County Water Company constructed a new outlet from Lake Wohlford consisting principally of a 2,521-foot long 48-inch pipeline which leads to the penstocks at the Bear Valley powerhouse. San Diego County Water Company paid two-thirds of the cost and Mutual, one-third.³⁸

³⁶Mutual's application to amend its license to authorize the construction, operation and maintenance of the dam was then pending, but the license was not so amended until 1939.

³⁷While Mutual's generation of electric energy at its two facilities varies widely with the availability of water, it averages about 4,000,000 kilowatt-hours per year.

³⁸Apparently the 1939 amendment to Mutual's license also covered the modification of this project work. But in an agreement dated October 1, 1941, Mutual and San Diego County Water Company acknowledged that the latter "owns an undivided two-thirds interest in said 48 inch pipe line; and [Mutual] owns an undivided one-third interest therein," and agreed that they would pay their respective shares of taxes levied against the pipeline. Like the construction of the concrete diversion dam, the construction of the pipeline without the Commission's prior approval clearly violated Article 4 of Mutual's license and Section 10(b) of the Federal Water Power Act [now Section 10(b) of the Federal Power Act]. And the change in ownership of the pipeline clearly violated of the Federal Water and Article 22 of Mutual's license and Section 8 of the Federal Power Act and required San Diego County Water Company to become a joint licensee of Project No. 176 with Mutual.

Following the completion of the enlargement of the Escondido Canal in 1929 and the commencement of its joint use, a joint canal superintendent's office was established as a separate entity which was responsible to the Boards of Directors of Mutual and San Diego County Water Company (and now Vista), but not controlled by either company. Since that time, the joint canal superintendent's office has been responsible for operating and maintaining that conduit, including regulating, measuring and recording the flows into and through the conduit, computing natural and Indian flows, and repairing access roads and a communication system. The joint canal superintendent's office submits annually to the respective Boards of Directors proposed estimates of maintenance and repair work, and is financed by a revolving fund contributed by Mutual and Vista in proportion to their respective amounts of water carried through the conduit during the preceding year.

In an agreement dated October 1, 1941, Mutual and San Diego County Water Company granted one another reciprocal storage rights in Lakes Wohlford and Henshaw.³⁹ In another agreement dated February 9, 1943, San Diego County Water Company granted Mutual the right to utilize some of its water to generate power at its Bear Valley facilities.⁴⁰

³⁹Vista's share of the water which is discharged from the Escondido Canal into Lake Wohlford ordinarily is released from Lake Wohlford concurrently and, therefore, is rarely placed in storage. As a result, Lake Wohlford ordinarily is used to store Mutual's share of the water.

⁴⁰The water released from Lake Wohlford flows through the 48-inch jointly owned pipeline, as indicated, and then through one or the other of two penstocks, one owned by Mutual and the other by Vista. The water entering Mutual's penstock is Mutual's water and, when capacity is available, also some of Vista's water; and the water which so flows through Mutual's penstock is utilized to generate electric power at the Bear Valley powerhouse and is then discharged into either Escondido's water distribution system or the Vista Canal for transportation to Vista's service area. The water entering Vista's penstock, on the other hand, is Vista's water, by-passes the Bear Valley powerhouse and is discharged into the Vista Canal.

In 1946 Vista acquired all of the outstanding stock of San Diego County Water Company and thereupon succeeded to the latter's interests in Lake Henshaw and Warner's Ranch.

During the 1948-49 period the course of the Escondido Canal was changed from Bear Valley Creek by the installation of a 6,000-foot 45-inch pipeline leading to Escondido Creek and occupying 3.08 acres of the San Pasqual Indian Reservation. That change was authorized in a license amendment issued April 2, 1957, which also provided for an annual charge of \$25 which was found reasonable for "recompensing the San Pasqual Indians for the use, occupancy and enjoyment of the San Pasqual Indian Reservation. . . ." No other annual charges for the use of Indian lands by Project No. 176 have been fixed.⁴¹

In 1950 Escondido became a member agency of the San Diego County Water Authority which, in turn, is a member agency of the Metropolitan Water District of Southern California (MWD). As a result, Escondido obtained a supplementary supply of Colorado River water.

Drought conditions in northern San Diego County in the late 1940's depleted Lake Henshaw to the point that on September 11, 1950, Mutual and Vista entered into a "Temporary Pumping Agreement" under which ground water was pumped from a portion of the Warner Basin underlying Warner's Ranch to augment the surface flows into Lake Henshaw, and under which Vista agreed to sell to Mutual, and did sell, "In-lieu A Water" for \$20 per acre-foot and

⁴¹Prior to the issuance of the license Interior indicated that annual charges for the occupancy of Indian lands would not be necessary because the agreement of February 2, 1914, was to be incorporated into the license.

"In-lieu B Water" for \$35 per acre-foot.⁴² That agreement was supplemented on August 10, 1951, and again on March 25, 1957. Under the latter supplement, Mutual's and Vista's normal needs for future water years were fixed at 10,600 acre-feet and 14,600 acre-feet, respectively, and the parties agreed to share equally the cost of developing a Secondary Well Field on Warner's Ranch and to divide equally the water produced from that field.⁴³

In 1954 Vista began to purchase supplementary Colorado River water from Bueno Colorado Municipal Water District, and in 1955 Mutual began to purchase supplementary Colorado River water from Rincon del Diablo Municipal Water District, both of which are member agencies of San Diego County Water Authority which, as indicated, is a member agency of MWD.

Notwithstanding Mutual's, Escondido's and Vista's common access to Colorado River water, the Escondido Canal continued to carry the major portion of the domestic and irrigation water for the Escondido and Vista service areas. The Escondido Canal conveys an average of about 14,600 acre-feet per year consisting of 4,100 acre-feet representing Mutual's appropriation of the San Luis Rey River, 2,700 acre-feet representing Mutual's purchases of Henshaw-stored water from Vista, and 7,800 acre-feet representing Vista's appropriation of the San Luis Rey River. And substantially

⁴²Under the agreements of June 21, 1912, November 10, 1922, an October 1, 1941, Mutual is guaranteed annually 4,143 acre-feet of natural flow at its diversion dam (its A Water) and is allowed to purchase annually up to 5,000 acre-feet of Henshaw-stored water (its B Water). Mutual's "In-lieu A Water" is the pumped volume it is allowed to purchase equivalent to the lesser of (a) the shortfall of its A Water and (b) 3,000 acre-feet. Its "In-Lieu B Water" is the pumped volume it is allowed to purchase equivalent to the shortfall of its B Water.

⁴³The parties have stipulated, "The water pumped from the wells above Lake Henshaw is not intended for release at the Rincon penstock, and no credit is given the Rincon Indians as a result of such pumping."

all of the summer flow in the Escondido Canal consists of Henshaw-stored water.

In 1963 an agreement in principal was reached for the sale of Mutual's assets to Escondido, including Mutual's water distribution system outside Escondido's boundaries and the works of Project No. 176. On April 5, 1965, they filed with the Commission a joint application for permission to transfer Mutual's license for Project No. 176. But the proposed sale was blocked in 1966 by a shareholder's lawsuit.

In 1968 Escondido commenced condemnation proceedings to acquire Mutual's assets. After lengthy negotiations they agreed upon a price of \$6,250,000, subject to certain adjustments, and in April 1970 they signed a formal agreement which would have settled the proceedings and transferred Mutual's assets to Escondido. But on July 25, 1969, the Rincon and La Jolla Bands initiated litigation⁴⁴ against Mutual, Escondido, Interior and the United States Attorney General requesting, among other matters, declaratory relief to the effect that the purported agreements of June 4, 1894, and February 2, 1914, were void, an injunction prohibiting the diversion of San Luis Rey waters into the Escondido Canal, and substantial damages. Delays caused by the litigation resulted in rescission of the April 1970 agreement. And on October 21, 1970, Mutual and Escondido filed a notice of withdrawal of their joint application to transfer the license.

⁴⁴Civil Action No. 69-217-S, United States District Court for the Southern District of California.

In July 1972 the United States initiated litigation in the same court against Mutual and Vista (Civil Action No. 72-271-S) seeking reformation of allegedly breached water contracts, and damages, and the Rincon and La Jolla Bands initiated litigation against Vista (Civil Action No. 72-276-S) seeking to invalidate certain water contracts, and damages. The three lawsuits were consolidated and, although there have been some discussions toward their settlement, they have not been tried.

On June 19, 1970, Escondido commenced a tender offer to purchase all of Mutual's stock not owned by it and, as a result, acquired approximate 90% control of Mutual through stock and/or proxies.⁴⁵ The terms of the tender offer included an Operating Agreement under which Escondido's and Mutual's water distribution systems would be merged and operated by Escondido, and Project No. 176 would continue to be operated and maintained by Mutual. The Operating Agreement was approved by the United States District Court for the Southern District of California subject to certain conditions and thereafter became effective on April 30, 1971.⁴⁶

Procedural

On September 25, 1970, during the course of Escondido's tender offer, Interior initiated this consolidated proceeding by filing with the Commission a Complaint on behalf of the La Jolla, Rincon and San Pasqual Bands against Mutual and Escondido, alleging that Mutual violated its license and the Federal Power Act (1) by constructing the concrete diversion works intercepting the surface and ground flows without the Commission's prior approval and without authority from the United States or the Bands; (2) by constructing a residence near the diversion works without the Commission's approval and without authority from the United States or

⁴⁵Escondido proposes to acquire all of Mutual's outstanding stock and dissolve Mutual.

⁴⁶By letter dated March 9, 1971, the General Counsel of the Federal Power Commission expressed his opinion (which he said "is not binding upon the Commission") that the Operating Agreement did not require Commission approval "because it does not undertake to transfer the operation of the licensed project facilities." The Bands and Interior contend that Escondido is operating Project No. 176, and there is evidence in the record from which such a conclusion can be drawn. But there is also counterbalancing evidence. In any event, there is no need to decide the issue because, as indicated, Mutual will be a joint licensee of Project No. 176 under the new license.

the Bands; (3) by permitting Vista and its predecessors to exercise joint possession, operation and control of the licensed facilities, and increasing the size of the conduit, changing its type and increasing its easement burden, all without authority of the Commission, the United States or the Bands; (4) by constructing and maintaining roads and other facilities outside the rights-of-way; and (5) by failing to release waters reserved for the Rincon Band under the agreement of February 2, 1914.

Interior asserted, among other matters, that the continued operation of the licensed works was in substantial conflict with the purposes for which the three reservations had been created in that the water table underlying the La Jolla and Rincon Indian Reservations was being lowered, the license did not satisfy the water needs of the San Pasqual Band, the route of the conduit divided the San Pasqual Indian Reservation and the compensation for the use and occupancy of the reservations was inadequate. Interior requested revocation of the license and/or injunctive relief prohibiting continued violations, damages, releases of water for the benefit of the three Bands, and past and present annual charges.

Mutual and Escondido filed an answer which generally admitted factual matters (including the fact that Vista and its predecessor "have, pursuant to contract, used the Mutual's conduit to transport water"), denied any wrongdoing and asserted that a timely application for a new license would be filed.

The La Jolla, Rincon and San Pasqual Bands filed a Petition to Intervene and Complaint in Intervention alleging, among other matters (1) that Section 8 of the Act of January

12, 1891 (commonly called the Mission Indian Relief Act)⁴⁷ prevented the Federal Power Commission from acquiring authority to grant rights-of-way or other property interests related to the conveyance of water in their reservations without their prior consent; and (2) in view of the fact that Mutual's service area has access to alternate supplies of water and power (unlike the 1890's when the conduit was constructed and the 1910's when power was added), Mutual's dominant purpose in continuing to generate power "is to maintain a colorable claim to the rights-of-way and other interests".⁴⁸

⁴⁷Section 8 of the Mission Indian Relief Act provides, in pertinent part,

"That previous to the issuance of a patent for any reservation . . . the Secretary of the Interior may authorize any citizen of the United States, firm, or corporation to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such reservation for agricultural, manufacturing, or other purposes, upon condition that the Indians owning or occupying such reservation or reservations shall, at all times during such ownership or occupation, be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior, and upon such other terms as he may prescribe. . . . And any patent issued for any reservation upon which such privilege has been granted, or for any allotment therein, shall be subject to such privilege, right of way or easement. Subsequent to the issuance of any tribal patent, or of any individual trust patent . . . any citizen of the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose."

⁴⁸They cited a valuation report which had been prepared for Mutual in 1962 and indicated that the direct expenses of operating the Rincon power facilities for "the past seven years . . . have been nearly \$400 per year greater than revenue." Whatever inferences might be drawn from the economic situation of the late 1950's and early 1960's, the record indicates that the revenues from both power facilities were expected to exceed their direct operating expenses by approximately \$13,000 in the 1973-74 period based upon their historic annual average power production and the fact that revenues per kilowatt-hour rose sharply in the early 1970's.

Although Mutual and Escondido opposed the petition, the Commission, by order issued April 14, 1971, designated Interior's Complaint as Docket No. E-7562 and initiated an investigation pursuant to Section 306 of the Federal Power Act to consider (1) the alleged violations, and (2) annual charges for the use of the Indian lands. Additionally, the Commission permitted the interventions.

In the meanwhile, on April 1, 1971, Mutual filed an application for a new minor license⁴⁹ for Project NO. 176, proposing in substance to continue operating the project works in a manner similar to that which had been followed for the preceding half-century.

The La Jolla, Rincon and San Pasqual Bands filed a combined petition to intervene and motion to consolidate Mutual's application with Docket No. E-7562, asserting, among other matters, that Section 10(e) of the Federal Power Act (pertaining to annual charges) prohibits the Commission from issuing a new license without their consent, and they "hereby specifically refuse to approve, consent to, or ac-

⁴⁹Section 10(i) of the Federal Water Power Act contained special provisions for certain small or so-called "minor" projects "of not more than one hundred horsepower capacity". The installed capacity of Project No. 176 in 1924 was 800 horsepower and, therefore, the Federal Power Commission issued a license for a "major" project. Section 10(i) of the Federal Power Act was last amended in 1962 and now provides,

"In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this Part, except the license period of fifty years, as it may deem to be in the public interest to waive under the circumstances: *Provided*, That the provision hereof shall not apply to annual charges for use of lands within Indian reservations."

The installed capacity of Project No. 176 as enlarged in 1928 is 1,300 horsepower and, therefore, it qualifies for a license for a "minor" project. Furthermore, Mutual has requested waiver of certain provisions of the Federal Power Act pursuant to Section 10(i).

quiesce in" a new license. Interior and SDG&E also filed petitions to intervene. As part of its petition, Interior moved for consolidation asserting that the issuance of a new license to Mutual would violate Section 23(b) of the Federal Power Act because Vista "exercises joint possession, operation and control of the facilities for which this new license is sought", and because "the waters utilized by Project No. 176 are stored, released and controlled upstream from the said Project on the San Luis Rey River at Henshaw Dam which is owned by Vista Irrigation District."

The Commission, by order issued July 30, 1971, initiated an investigation pursuant to Sections 4(g) and 306 of the Federal Power Act, among other provisions, "to consider the extent, if any, that Vista Irrigation District is involved in the operation of Project No. 176 and the occupancy of Indian lands or other lands of the United States", designating that investigation as Docket No. E-7655. Additionally, the Commission consolidated the complaint, relicensing and investigatory proceedings and permitted the interventions of Interior, the three Bands and SDG&E in the consolidated proceeding.

On May 22, 1972, as supplemented October 18, 1972, Interior requested the Commission to recommend to Congress that the United States exercise its right to recapture the portion of Project No. 176 from the diversion works on the San Luis Rey River to the point of discharge into Lake Wohlford.³⁰ Interior indicated that it would eliminate the power drop on the Rincon Indian Reservation and operate the Escondido Canal to transport water to the La Jolla, Rincon and San Pasqual Indian Reservations as well as the

³⁰Interior's request would permit the Commission to relicense the portion of Project No. 176 downstream from the point of discharge into Lake Wohlford.

Escondido and Vista service areas:

“The public interest will be served by placing operation and control of the diversion works, the conduit, etc. in the hands of the United States thus ending the long controversy over the operation of that canal. The United States can then be responsible to see that the canal is operated for the benefit of all who have a right to use the water therefrom and it can see that each party gets the amount of water to which they are entitled.”

On December 12, 1972, the Commission designated Interior's proposal to recapture and operate the Escondido Canal as part of the consolidated proceeding.

On June 5, 1972, the La Jolla, Rincon, San Pasqual and Pauma Bands⁵¹ filed an untimely application for a nonpower license asserting (1) that “the license for power purposes can no longer be justified economically” because the 1962 evaluation report prepared for Mutual indicated, as noted, that the direct expenses of the Rincon power plant exceeded its revenues, and the return on the Bear Valley power plant would not pay the interest on its replacement cost, (2) that a nonpower license would have virtually no impact on the power system served by the licensed facilities because the power generated represents less than 1% of SDG&E's purchased energy, (3),

“The Bands plan to make beneficial use of the water by irrigating more reservation acreage and developing a new recreational facility on the Rincon Indian Reservation called Paradise Lake. The La Jolla Band plans to further expand its fishery and develop additional camping and other recreational facilities on the reservation. In addition, under the Bands' application, current rights-of-way under Project No. 176 will be sub-

⁵¹The Pala Band joined in the application on July 9, 1973.

stantially narrowed, thereby freeing up land for other uses, and other rights-of-way will be either relocated or fenced, thereby making their use consistent with the needs and purposes of the Bands",⁵²

and (4) that the loss of water from the San Luis Rey River basin will cease and the water restored to in-basin uses:

"For all these reasons . . . the Bands submit that their application presents an alternative which results in the best comprehensive plan for improving and developing the San Luis Rey River basin."

On September 17, 1973, the Commission permitted the Bands' late filing and made it part of the consolidated proceeding.

Hearings were held in Escondido and Pala, California, and Washington, D.C., on 34 dates from September 19 through December 12, 1973.

On March 4, 1974, SDG&E filed an application for a new license for its Project No. 559 primary transmission line, and on September 3, 1974, the Commission permitted Mutual and the Rincon Band to intervene in that application and made it part of the consolidated proceeding. Hearings were held in Washington, D.C., on three additional dates in July 1974.

On November 25, 1975, more than four years after Mutual filed its application for a new license, Escondido adopted Mutual's application as part of its own application to become a joint licensee of Project No. 176. And on January 12, 1976, Mutual and Escondido amended their joint application

⁵²While the application purports to seek a nonpower license, it speaks of a proposed new water conduit north of the San Luis Rey River on which power would be developed for irrigation pumping. It also speaks of maintaining the Rincon and Bear Valley power facilities "until a major breakdown occurs", at which time such facilities would be sold for salvage.

to propose the construction of 8,550 feet of 48-inch pipeline principally on non-reservation lands and a sequential abandonment of approximately 12,000 feet of conduit on the eastern portion of the San Pasqual Indian Reservation, to reduce potential hazards from the open canal and protect their water supply from possible contamination.⁵³ In addition, the remaining 825 feet of open canal on the San Pasqual Indian Reservation would be fenced, and the abandoned rights-of-way would be restored to grade.

Additional hearings were held in Escondido and Pala, California, Washington, D.C., on 14 dates in December 1975 and January 1976, bringing the record to 11,149 transcript pages and approximately 600 exhibits.

After briefing, the presiding administrative law judge issued a 110 page Initial Decision on June 1, 1977, in which he discussed the many issues which had been raised and ultimately concluded, subject to Commission review, that "the operation now going on and proposed for licensing is not a power project licensable under the Federal Power Act. . . ."⁵⁴ Accordingly, he dismissed Interior's Complaint and the Mutual/Escondido and SDG&E applications for new licenses and closed the investigation of Vista.

Briefs on and opposing exceptions were filed by the Bands and Interior jointly; by Mutual, Escondido and Vista jointly⁵⁵; by Vista separately and by the Commission staff. In addition, a brief on exceptions was filed by Interior separately;

⁵³Substantially the same proposal had appeared in Mutual's revised report on environmental factors filed April 1, 1974.

⁵⁴Nonetheless, he also indicated that a license should be issued, if at all, to Mutual, Escondido and Vista.

⁵⁵The brief on exceptions indicates for the first time in this proceeding that Vista would accept the status of being a joint licensee of Project No. 176 with Mutual and Escondido, but it also indicates that Vista opposes vigorously any licensing of its Henshaw facilities.

a document styled "Motion For Leave To File Amicus Curiae Brief On Exceptions and Amicus Curiae Brief On Exceptions" was filed by Pacific Gas and Electric Company (PGandE)⁵⁶; a motion for leave to file a supplemental brief was filed by the Bands and oppositions to that motion were filed by Mutual, Escondido and Vista jointly and by the Commission staff. And finally, the principal parties with the exception of the Commission staff have requested oral argument in view of the novelty and complexity of the issues and the fact that this is the first contested relicensing proceeding to reach the Commission for decision.

JURISDICTION

The Present Project No. 176

The presiding judge concluded that Project No. 176 is not subject to the Commission's licensing jurisdiction because the generation of electric power is and always has been incidental to the project's primary purpose of conveying water for domestic and irrigation consumption. The production of power is insignificant in every way⁵⁷, he said, and

"When the power production facilities of a licensed power project become so insignificant their economic feasibility is irrelevant to the continued operation of the entire project it becomes clear that the operation

⁵⁶PGandE is not a party to this proceeding.

⁵⁷The judge found that the power facilities of Project No. 176 were old and only marginally profitable, that the Rincon power plant is not operated to maximize the generation of power, and that the 95% of the Project No. 176 power which is sold to SDG&E furnishes about 0.02% of the latter's power requirements and is considered by SDG&E as being non-scheduled power of relatively low value. He indicated, additionally, that the status of Project No. 176 was altered from "major" (more than 100 horsepower) to "minor" (not more than 2,000 horsepower) by the 1962 amendment to Section 10(i) of the Federal Power Act.

cannot, by any rational definition, be considered to be a power project."

And finally, he indicated that rights-of-way for irrigation canals are grantable by Interior under 43 U.S.C. §§ 946-9 and that 43 U.S.C. § 951 specifically provides, in this connection, that "said rights of way may be used . . . for the development of power, as subsidiary to the main purpose of irrigation or drainage."

The Bands and Interior support the judge's conclusion that Project No. 176 is not a power project. Interior asserts, among other matters, that when the production of power on a domestic and irrigation water supply project is *de minimis* (a) Interior's trust responsibilities pertaining to Indian reservations and natural resources are not displaced by the Federal Power Act and (b) the Commission should not exercise its licensing jurisdiction. Interior contends, in this connection, that when water rights are challenged in court and the challenge has substantial support in law, then applicants for a license cannot submit "satisfactory evidence" of their water rights as required by Section 9(b) of the Federal Power Act⁵⁸ until that challenge is resolved, for the applicants lack the *res* (water) upon which the Commission's jurisdiction can be exercised.

Mutual, Escondido, Vista and the Commission staff contend, on the other hand, that Project No. 176 is jurisdictional. We agree, and grant their exceptions. It has always

⁵⁸Section 9 provides, in pertinent part,

"That each applicant for a license hereunder shall submit to the Commission—

* * *

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes. . . ."

been understood that the principal purpose of the Federal Water Power Act of 1920 was to establish a national policy to promote the comprehensive development of water power on government lands and navigable waters other than by the government itself, and that such policy would be administered by abolishing the piecemeal authorities of the Secretaries of the Interior, Agriculture and War over the nation's hydro-electric resources and centralizing them in the Federal Power Commission.⁵⁹

The Commission is authorized by Section 4(e) of the Federal Power Act:

"To issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for . . . the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction . . . or upon any part of the public lands and reservations of the United States. . . ."⁶⁰

And those who may be so licensed are subject to the prohibitions of the first sentence of Section 23(b) thereof:

"It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters

⁵⁹445 F.2d, at page 750.

⁶⁰It is not disputed that the La Jolla, Rincon, San Pasqual, Pauma and Pala Indian Reservations and the Cleveland National Forest are "reservations" within the meaning of Section 3(2) of the Federal Power Act and that the government lands occupied by Project No. 176, other than those foregoing "reservations" which are so occupied, are "public lands" within the meaning of Section 3(1).

of the United States, or upon any part of the public lands or reservations of the United States . . . except under and in accordance with the terms of . . . a license granted pursuant to this Act.”

The foregoing portions of Sections 4(e) and 23(b) define the parameters of the Commission’s licensing jurisdiction which are applicable to most situations and are pertinent to our analysis.⁶¹ So long as any part of a project is situated on navigable waters, or on public lands or reservations, and so long as that project generates any electric power, however minor in amount and however insignificant to the project as a whole,⁶² and so long as interstate or foreign commerce

⁶¹The fact that the first sentence of Section 23(b) prohibits the acts associated with project works which the Commission is authorized by Section 4(e) to license, establishes that the Commission’s jurisdiction over constructing, operating and maintaining project works within the scope of Section 23(b) is mandatory rather than discretionary, contrary to Interior’s contention.

⁶²The fact that Section 10(i) authorizes administrative waivers of most licensing provisions, rather than administrative exemption from the Federal Power Act, indicates without question that even the smallest projects in terms of power production are required to be licensed. Project No. 176 was a major project prior to the 1962 amendment to Section 10(i), and the legislative history of that amendment indicates clearly that its purpose was not to exempt any projects, but only to change the dividing line between major and minor projects. See H.R. No. 2241 at U.S. Code Cong. & Adm. News, 87th Cong., 2nd Sess., 1962, at page 2375.

Furthermore, the Supreme Court, in *Federal Power Commission v. Florida Power & Light Co.*, 404 U.S. 453 (1972), said in a footnote, 404 U.S., at page 461,

“If any FP&L power has reached Georgia, or FP&L makes use of any Georgia power, no matter how small the quantity, FPC jurisdiction will attach because it is settled that Congress has not ‘conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved and we do not . . . supply such a jurisdictional limitation by construction.’ *Connecticut Power and Light*, [324 U.S. 515 (1945)], at 536. See also *Pennsylvania Water and Power Co. et al. v. FPC*, 343 U.S. 414 (1952).”

Accord, with respect to jurisdiction based upon water power which affects interstate commerce, see the Commission’s orders affirming

(footnote continued on following page)

is affected, the works of that project are subject to be licensed and required to be licensed under the Federal Power Act.⁶³

Although the San Luis Rey River is not navigable, portions of Project No. 176 are situated on public lands and reservations of the United States. The Rincon and Bear Valley power facilities have generated approximately 4,000,000 kilowatt-hours on a yearly average since 1923 and the power which is so generated is transmitted through SDG&E into the California Power Pool and elsewhere through the Western Systems Coordinating Council. As a result, we find that the facilities of Project No. 176 are clearly subject to the Commission's licensing authority under Section 4(e) of the Federal Power Act and must be licensed by virtue of Section 23(b).

Furthermore, 43 U.S.C. §§ 946-9 and 951 on which the presiding judge relies were repealed by the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701,

jurisdiction issued December 14, 1976, and on reconsideration issued February 17, 1977, in *Natahala Power and Light Company*, Project Nos. 2601, *et al.*

Administrative exemptions were not authorized until the enactment of Section 30 (as Section 213 of the Public Utility Regulatory Policies Act of 1978), which authorizes the Commission to exempt certain facilities located on non-Federal lands from the licensing requirements of the Federal Power Act. Public Law 95-617, § 213, 92 Stat. 3148 (Nov. 9, 1978).

⁶³The term "project" is defined in Section 3(11) of the Federal Power Act as including "water rights . . . which are necessary or appropriate in the maintenance and operation" of the project. Since the Commission licenses the construction, operation and maintenance of project works, and since the latter are limited by Section 3(12) to "the physical structures of a project", the Commission has authority to act in the premises by issuing a license notwithstanding that the asserted water rights associated with a project are currently being challenged in court. Interior's contention that "satisfactory evidence" cannot be submitted when water rights are being challenged, is more realistically viewed as running to the applicant's ability to operate the project works and, consequently, whether a license *should* be issued.

et seq., which provides at 43 U.S.C. § 1761(a):

“The Secretary [of the Interior], with respect to the public lands and, the Secretary of Agriculture, with respect to lands within the National Forest System . . . are authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for—

“(1) reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water;

* * *

“(4) systems for generation, transmission, and distribution of electric energy, except that the applicant shall also comply with all applicable requirements of the Federal Power Commission under the Federal Power Act of 1935. . . .”

Assuming *arguendo* that the Federal Land Policy and Management Act of 1976 gives the Secretaries of the Interior and Agriculture concurrent authority with this Commission to grant rights-of-way for water power projects through government non-Indian lands⁶⁴, it makes no change in the interrelationship between the Federal Power Act and the statutes which it replaces. Now, as then, the construction, operation and maintenance of the facilities of water supply projects which generate electric power are licensable by this Commission under the Federal Power Act rather than by the said Secretaries under prior law and the Federal Land Policy and Management Act of 1976.

⁶⁴43 U.S.C. § 1702(e) defines the term “public lands” to exclude “lands held for the benefit of Indians. . . .” Nonetheless, Interior is empowered under 25 U.S.C. §§ 323 et seq. to grant rights-of-way through Indian lands for all purposes, but 25 U.S.C. § 326 provides that such authority “shall not in any manner amend or repeal” the Federal Power Act. 25 CFR § 161.2(c) provides, in this connection, that the implementing regulations do not apply to project works which are licensable under the Federal Power Act.

The Henshaw Facilities and Water Rights

One of the most troublesome aspects of this proceeding is the fact that Lake Henshaw and Henshaw Dam are not currently licensed under the Federal Power Act together with the other facilities situated on Warner's Ranch which are associated with their operation and maintenance, including the pumping facilities. In our opinion, they should be so licensed together with the water rights which are incident thereto. And the fact that they have not been licensed greatly complicates our resolving today many of the problems associated with San Luis Rey waters which have been developing and compounding for more than a half-century.

The presiding judge found that Henshaw Dam and Lake Henshaw are part of Project No. 176, rationalizing that Section 3(11) of the Federal Power Act defines the term "project" as meaning a

"complete unit of improvement or development consisting of

- 1 a power house,
- 2 all water conduits,
- 3 all dams and appurtenant works and structures (including navigation structures) which are a part of the said unit, and all storage, diverting, or forebay reservoirs directly connected therewith,
- 4 the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system,
- 5 all miscellaneous structures used and useful in connection with said unit or any part thereof, and

- [6] all water rights, rights-of-way, ditches, dams, reservoirs, lands, or interests in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit. . . .”

and rationalizing further that the two Henshaw facilities, the diversion dam, Escondido Canal, Wohlford Dam and Lake Wohlford and the Rincon and Bear Valley power facilities are “all operated as a unit, each step is affected by the steps ahead of it.” Accordingly, he concluded that Vista must join in Mutual’s and Escondido’s application to the extent of Henshaw Dam and Lake Henshaw⁶⁵ and its utilization of the Escondido Canal.

Vista excepts to the inclusion of “Henshaw Dam, Lake Henshaw and its immediate environs surrounding the high-water mark of the reservoir basin” within a license for Project No. 176, asserting (1) that the San Luis Rey River is a non-navigable intrastate stream, (2) that Henshaw Dam and its entire impoundment area are situated on private property with the exception of a *de minimis* portion of the spillway, (3) that Henshaw Dam was not constructed for the purpose of developing power and there is no direct connection between it and the facilities of Project No. 176, (4) that the Commission in *California Aqueduct*⁶⁶ excluded

⁶⁵Apparently the presiding judge did not include the pumping facilities on Warner’s Ranch. Since they were installed to increase the volume of water impounded by Henshaw Dam they serve the same function in a water-deficient environment as increasing the height of a dam in an environment of greater water abundance. They are clearly “miscellaneous structures used . . . in connection with” Henshaw Dam and Lake Henshaw as well as the greater unit which includes all of the present Project No. 176.

⁶⁶Opinion No. 688 issued February 6, 1974, in *Department of Water Resources of the State of California and City of Los Angeles Department of Water and Power*, Project No. 2426, 51 FPC 529.

The facilities licensed in *California Aqueduct* were those directly associated with each unit for the production of power, including the storage facilities. Here, Lake Henshaw is the only storage facility directly serving the Rincon powerhouse and should, therefore, be licensed consistent with *California Aqueduct*.

from a license numerous facilities unrelated to the production of power, (5) that *Farmington*⁶⁷ precludes the issuance of a license since Henshaw Dam was lawfully constructed before 1935, and (6) "Vista as a co-licensee of the works comprising the present Project 176 would be amenable and subject to all reasonable conditions which the new license might impose on the operation of Henshaw Dam and reservoir as a headwater development."

The Commission staff contends that Henshaw Dam and Lake Henshaw should be included in a new license for Project No. 176, and the Bands and Interior agree if the Commission issues a power license to Mutual and/or Escondido.

Although Vista claims that Henshaw Dam was not constructed for the purpose of developing power, it appears that Vista's predecessors' notices of appropriation of the waters of the San Luis Rey River specifically include "developing power to be used in operating machinery for generating electricity". Construction of Henshaw Dam was begun in April or May 1922; and the agreement of June 28, 1922, between Henshaw and Interior acting on behalf of the Rincon and Pala Bands recites that "power development" was one of the purposes of the dam. Similarly, the agreement of November 10, 1922, between Mutual and Henshaw's successor, San Diego County Water Company, recites that it was contemplated that Henshaw-impounded water would be used to generate electric power.

The agreement of June 21, 1912, between Mutual and Henshaw fixed Mutual's natural flow entitlement at 4,143 acre-feet from November 1 through July 1 each year. And the agreement of November 10, 1922, between Mutual and

⁶⁷*Farmington River Power Company v. Federal Power Commission*, 455 F.2d 86 (CA2, 1972).

Henshaw's successor, San Diego County Water Company, provided in substance that Mutual would satisfy the Rincon Band's natural flow entitlement from its own natural flow entitlement, that Mutual could purchase 5,000 acre-feet for delivery in June through November each year and that Mutual and San Diego County Water Company would share the cost of enlarging and lining the Escondido Canal and operate and maintain it through a "superintendent". The canal was enlarged and lined in the 1920's, the Bear Valley powerhouse was enlarged and a third generator installed in 1928, and a joint canal superintendent's office was established. On October 1, 1941, Mutual and San Diego County Water Company granted one another reciprocal storage right in Lakes Wohlford and Henshaw, and on February 9, 1943, the latter granted Mutual the right to utilize some of its water to generate power at its Bear Valley facilities.

Henshaw Dam was completed in December 1922, and thereafter it impounded in Lake Henshaw and co-mingled the inflows from the uppermost 36% of the San Luis Rey watershed, consisting of 86% of the portion of that watershed lying upstream from Mutual's intake. The Commission staff estimates that 77% of the water arriving at the intake originates above Henshaw Dam and, conversely, that 48% of the natural flow at the intake would spill by it if it were not impounded in Lake Henshaw.

It is apparent that although Henshaw Dam and Lake Henshaw have not been and are not owned by the same legal entities as the Escondido Canal, Wohlford Dam and Lake Wohlford, all of those facilities have been operated for more than a half-century as a single undertaking to supply water for domestic and irrigation consumption to the vicinities of Escondido and Vista, California, and we so find. Henshaw Dam impounds in Lake Henshaw and co-mingles all of the upstream waters which reach it, including Mutual's and the

Rincon Band's natural flow waters and Vista's appropriated waters, and those co-mingled water are released downstream into the San Luis Rey River and are diverted into the Escondido Canal. And from 1923 to 1970, inclusive, Project No. 176 generated an average of 4,075,388 kilowatt-hours per year, compared to 1,581,990 kilowatt-hours per year from 1917 to 1922, inclusive, prior to the construction of Henshaw Dam.

Accordingly, we find from the foregoing and other events prior to, during and subsequent to the construction of Henshaw Dam, that it was constructed and has been and is being used for the purpose, among others, of generating electric power at the Bear Valley and Rincon powerhouses of Project No. 176.⁶⁸ Although Henshaw Dam, Lake Henshaw and the associated pumping facilities and water rights are generally under different ownership from the works of Project No. 176, we find that they are in fact part of the same complete unit of development as Project No. 176, "the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit," within the meaning of Section 3(11) of the Federal Power Act.⁶⁹

Farmington does not help Vista because the impact of that decision would be to preclude the Commission from requiring licensing on the ground that the Henshaw facilities are on a non-navigable headwater (the San Luis Rey River) of a navigable waterway (the Pacific Ocean). *Farmington* does not negate a licensing requirement on other grounds,

⁶⁸The presiding judge's statement that Henshaw Dam was not built "for power purposes" is inconsistent with those facts and events.

⁶⁹Since all of the water which is designated as Vista's originates above Henshaw Dam, and since some Vista-designated water is utilized to generate electric power at the Bear Valley powerhouse, there can be no question that Henshaw-impounded water is utilized to generate electric power.

such as the fact that a portion of the spillway of Henshaw Dam and the flood area of Lake Henshaw are situated within the Cleveland National Forest⁷⁰ and the fact that the waters impounded by Henshaw Dam develop water power in conjunction with the facilities of Project No. 176.⁷¹

Since Vista is required by the California Department of Water Resources, Division of Safety of Dams, to hold Lake Henshaw to 10,000 acre-feet until appropriate modifications are made to comply with current safety standards, and since any new construction would appear to bring the Henshaw facilities within *Taum Sauk*, *Farmington* appears to be of little practicable significance even assuming *arguendo* that it currently precludes the assertion of jurisdiction.⁷²

Having decided that the Henshaw facilities must be licensed under the Federal Power Act, we find that they

⁷⁰*Federal Power Commission v. Oregon*, 349 U.S. 435 (1955).

⁷¹In *Taum Sauk (Federal Power Commission v. Union Electric Co.*, 381 U.S. 90 (1965)), the Supreme Court considered the 1935 amendments to Section 23 of the Federal Water Power Act and held that "Congress has required a license for a water power project utilizing the headwaters of a navigable river to generate energy for an interstate power system." But seven years later in *Farmington* the United States Court of Appeals for the Second Circuit decided that a license is not required for a dam constructed prior to 1935 across a nonnavigable stream, rationalizing that the 1935 amendment to Section 23 made the filing of a declaration of intention mandatory with respect to any person "intending" to construct a dam or other project work in nonnavigable waters, and that such mandatory requirement had no retroactive application.

The second sentence of Section 23(b) addresses the construction of project works across, along, over or in nonnavigable waterways. Conversely, that sentence does not address the construction, operation or maintenance of project works upon the public lands or reservations of the United States. Such acts with respect to such project works are prohibited by the first sentence of Section 23(b) "except under and in accordance with the terms of a . . . license granted pursuant to this Act."

⁷²We take official notice of the fact that a document entitled "Draft Environmental Impact Report of the Modification of Henshaw Dam and Warner Ranch Ground Water Program" dated May 1978, has been submitted on behalf of Vista to the Commission for comment.

should be licensed as part of Project No. 176 and not separately, first, because they are operated with the facilities of Project No. 176 as part of a single undertaking, and second, because Vista is in law, and must become in name, a joint licensee of Project No. 176.

Vista Irrigation District

In 1924 O. C. Merrill, Executive Secretary of the Federal Power Commission, tendered to Mutual a draft of a proposed license for Project No. 176, and Mutual then informed Mr. Merrill, and furnished him a copy, of the agreement of November 10, 1922, inquiring whether that agreement conflicted with Article 22 of the proposed license, requiring Mutual to retain possession of its properties. Mr. Merrill replied that the "agreement indicates" that Mutual retained sufficient control to comply with the proposed license.⁷³

Today, with the knowledge of the ensuing half-century, we find that Vista's predecessor acquired sufficient control of Mutual's properties and their operation and maintenance that it should have been, and Vista should now become, a joint licensee of Project No. 176 with Mutual.⁷⁴

⁷³We do not agree with Mutual's, Escondido's and Vista's contention that the agreement of November 10, 1922, was thereby "approved by the FPC prior to the issuance of the license."

⁷⁴Henshaw Dam was completed in December 1922 following which, in the middle to late 1920's, the Escondido Canal was enlarged and improved, Henshaw Dam was raised, the concrete diversion dam was constructed and the Bear Valley powerhouse was enlarged and a third generator was installed, among other changes to the complete unit of development. The costs of many if not all of these changes were shared by Mutual and San Diego County Water Company, generally on a one-third/two-thirds basis, and the latter acquired a perpetual right to utilize up to two-thirds of the carrying capacity of the Escondido Canal and to store water in Lake Wohlford. The operation and maintenance of the Escondido Canal and certain related facilities were transferred to a joint canal superintendant who was chosen by the two companies but removable by either, and was subject to the control of the boards of directors of the two companies and financed in accordance with their respective volumes of water carried through the Escondido Canal. These facts, among others, establish that there was and is a comprehensive plan under which Mutual and San Diego County Water Company, and later Vista, became and are partners in the operation and maintenance of the complete unit of development which includes Project No. 176.

One aspect of Vista's predecessor's and Vista's control of Project No. 176 requires special consideration. When the license for Project No. 176 was issued in 1924, the water which was discharged from Lake Wohlford flowed through an open channel until it reached the penstock comprising the power drop to the Bear Valley powerhouse. Apparently that channel was not large enough to carry the water of both Mutual and San Diego County Water Company, for the agreement of November 10, 1922, contemplated the construction of a new larger outlet from Lake Wohlford and a sharing of the costs by the two companies equally. In 1929, a year after the Bear Valley powerhouse was enlarged, a new outlet consisting principally of a 2,521 foot-long 48-inch pipeline was constructed. And, in an agreement dated October 1, 1941, Mutual and San Diego County Water Company acknowledged

"that two-thirds of the entire cost of constructing said 48-inch pipe line was paid by [San Diego County Water Company], and one-third of such cost was paid by [Mutual]; and that [San Diego County Water Company] owns an undivided two-thirds interest in said 48-inch pipe line, and [Mutual] owns an undivided one-third interest therein.

"[San Diego County Water Company] agrees that it will pay . . . two-thirds of any and all taxes of every kind and nature levied against said 48-inch pipe line, and [Mutual] agrees that it will pay . . . one-third of any and all taxes of every kind and nature levied against said pipe line."

The rights granted to Mutual under the 1924 license include the rights to operate and maintain the channel from Lake Wohlford to the Bear Valley penstock. If an undivided proprietary interest in that channel did not lodge in San Diego County Water Company in 1929, such an interest was certainly transferred from Mutual to San Diego County

Water Company on October 1, 1941. In either case, Article 22 of the license was violated. And in either case, the ownership of an undivided interest in the channel by San Diego County Water Company and, later, by Vista, is inconsistent with Mutual's exclusive rights as sole licensee to operate and maintain the channel.⁷⁵

Section 8 of the Federal Power Act provides,

"That no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the Commission; and any successor or assign of the rights of such licensee . . . shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this Act to the same extent as though such successor as assign were the original licensee hereunder. . . ."

While Vista now consents to becoming a joint licensee under a new license for Project No. 176, we have investigated under Section 4(g) of the Federal Power Act and find that Vista's predecessor was in law at least from 1941, and Vista has been in law since 1946 when it succeeded to the interests of San Diego County Water Company, a joint licensee with Mutual of Project No. 176. Vista has been and is subject to all the provisions and conditions of the Federal Power Act to the same extent as though it were a licensee of Project No. 176 and, as a result, it is subject to the Commission's orders, including orders pertaining to its Henshaw facilities and water rights which are part of the complete unit of development embracing Project No 176.

⁷⁵ Additionally, Mutual and Vista are joint owners of a 1928 easement across the Cuca Ranch providing access to the diversion dam, and it is stipulated that one of the two penstocks currently leading to the Bar Valley powerhouse is *owned* by Vista.

City of Escondido, California

Escondido has been attempting since 1963 to acquire either Mutual or its assets, and its most recent effort by which Escondido hopes to acquire and then dissolve Mutual was restrained temporarily in 1971 by the United States District Court for the Southern District of California. Although that court is no longer restraining Escondido's acquisition and dissolution of Mutual, it has indicated that it will not allow a distribution of proceeds until the litigation is adjudicated on the merits. In view of the uncertainties of that consolidated litigation and this consolidated proceeding, Escondido has not consummated its acquisition and dissolution of Mutual.

It is not disputed that any new license which may be issued to Mutual must be transferred to Escondido if the latter is to consummate its plan. But a question arises as to whether any new license which may be issued to Mutual can and should also be issued to Escondido as a joint licensee in the light of the latter's application to assume such a status now.

Licenses are issuable under the Federal Power Act to corporations and municipalities, among others, for the purpose of constructing, operating and maintaining project works and, as a result, Escondido can be licensed as a joint licensee only if it engages or proposes to engage in one or more of those activities with respect to Project No. 176.⁷⁶

Mutual is managed, under arrangements approved by the District Court, by a Board of seven directors of whom five

⁷⁶Unlike certain other statutes, such as the Securities Act of 1933 and the Securities and Exchange Act of 1934, the licensing provisions of the Federal Power Act do not include concepts of beneficial ownership. Accordingly, the parent of a wholly-owned subsidiary licensee is not required to obtain a license by reason of its status as a parent.

consist of the members of Escondido's governing body, and two represent Mutual's minority shareholders. Escondido is committed under those arrangements to make payments to Mutual to the extent that Mutual's expenses (excluding depreciation) exceed its revenues, so that Mutual will not have a profit nor incur a loss from its operations, including the operation and maintenance of Project No. 176. Escondido is also committed to make payments to Mutual to the extent that (1) additions and betterments (including contributions), less (2) retirements, plus (3) revenues in excess of expenses, are less than (4) the amount of depreciation. The total arrangement appears to be designed to preclude Mutual's financial status from changing.

While Escondido is not required to obtain a license by reason of its proprietary control of Mutual, its several attempts to acquire Mutual or Mutual's properties and the foregoing arrangements show clearly that Escondido's proposal to operate and maintain Project No. 176 is bona fide. We find, in this connection, that Escondido's failure to consummate its acquisition and dissolution of Mutual is reasonable in the light of the uncertainties attending the consolidated litigation in the District Court and this consolidated proceeding. Additionally, we find nothing prejudicial in licensing Escondido now as a joint licensee.⁷⁷

⁷⁷Mutual is an investor-owned "corporation" within the meaning of Section 3(3) of the Federal Power Act, and, as such, it is not a "municipality" within the meaning of Section 3(7), such as both Escondido and Vista. Section 7(a) of the Federal Power Act requires the Commission to give preference to applications by States and municipalities "in issuing licenses to new licensees" under Section 15, provided, that the respective plans are or will within a reasonable time be equally well adapted. The application of Section 7(a) to a situation involving joint applicants consisting of a "corporation" (Mutual) and a "municipality" (Escondido) is hotly contested herein. But since Vista is a "municipality" and must in any event become a joint licensee with Mutual, if a license is issued to Mutual, Escondido's status as a joint licensee with

Indeed, such action will obviate the need to transfer the license at a later time.⁷⁸

Finally, Escondido will not have to stipulate, as indicated by the presiding judge, that (1) it will not claim the exemption from takeover under Section 14 provided by the Act of August 15, 1953, or (2) it will not assert its municipal preference under Section 7(a). Since takeover by the United States is *always* possible either under Section 14 or by condemnation, a license which includes Escondido as a licensee does not, in effect, grant a perpetual easement which amounts to a disposition of Indian reservation lands.⁷⁹

Mutual and Vista would not change the applicability or inapplicability of Section 7(a).

Similarly, the Act of August 15, 1953, (16 U.S.C. § 828), provides that Sections 4(b), 14, 301 and 302 of the Federal Power Act "shall not be applicable to any project owned by a State or municipality". Since Vista owns an undivided interest in the 48-inch pipeline which currently is part of Project No. 176, and since it also owns the Henshaw facilities which are part of the complete unit of development which includes Project No. 176, Escondido's status as a joint licensee with Mutual and Vista would not change the applicability or inapplicability of the Act of August 15, 1953.

⁷⁸Additionally, we have raised and considered the question of whether the joint canal superintendant, which is stipulated as being a "separate entity", should be licensed as operator of Project No. 176 jointly with, or in lieu of, others. Unlike the situation in Opinion No. 620, *El Paso Natural Gas Company*, 47 FPC 1527 (1972), the Commission could not discharge its regulatory responsibilities by licensing the joint canal superintendant alone since that entity operates only some of the facilities of the complete unit of development. And licensing that entity with others would not help the Commission to discharge its responsibilities since the other joint licensees possess the ultimate total regulatory responsibility and are the source of the ultimate total regulatory responsiveness.

⁷⁹The presiding judge apparently was unaware that the purpose of Section 14 is to provide a formula for payment rather than to confer a right of acquisition. Similarly, he was apparently unaware that the purpose of the Act of August 15, 1953, was to change that formula in cases of States and municipalities, as discussed *infra* under **FEDERAL TAKEOVER NOT RECOMMENDED**. Furthermore, the conclusion in the immediate preceding section that Vista is subject to all the provisions and conditions of the Federal Power Act, and the interpretation *infra* that the Act of August 15, 1953, applies to interests in projects owned by States and municipalities, moot the perpetual easement issue discussed by him.

Furthermore, Section 7(a) does not preclude the Commission from issuing a license other than to a State or municipality in a situation in which the Commission finds that the competing plans are better adapted to conserve and utilize in the public interest the water resources of the region, and the plans of the State or municipality cannot be made equally well adapted within a reasonable specified period of time. And, as a result, Section 7(a), either alone or in conjunction with Section 14, does not, in effect, grant a perpetual easement to a State or municipality which amounts to a disposition of Indian reservation lands.

THE BANDS' LICENSE APPLICATION IS DENIED

Mutual and Escondido propose to continue to operate Project No. 176 under a new power license in essentially the same manner as that project has been operated for more than a half-century, diverting an annual average of 14,600 acre-feet of San Luis Rey water into the Escondido Canal for conveyance to and consumption in the Escondido and Vista areas. The Bands, on the other hand, view that San Luis Rey water as being rightfully theirs under the Winters doctrine⁸⁰; and they propose to operate Project No. 176 under a nonpower license in such a manner as to bring approximately 200 acres of their reservation lands under irrigation each year until they are able to utilize all of the San Luis Rey water which they consider theirs. While there are other differences between the competing proposals, the

⁸⁰*Winters v. United States*, 207 U.S. 564 (1908). As most recently explained in *United States v. New Mexico*, — U.S. — (1978), (Slip Opinion, page 3),

“The Court has previously concluded that Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes, *impliedly* authorizes him to reserve ‘appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.’ ”

conflict focuses principally upon whether the water should be permitted to leave the San Luis Rey watershed as in the past and currently, or whether it should be placed under Indian control and kept within that watershed.⁸¹

The presiding judge indicated that a nonpower license should not be issued to the Bands on the ground that they had not established their right to the consumptive use of the San Luis Rey water, stating,

“[W]ithout the water, the Indians have no project at all, and upon that basis alone . . . it must follow that the application for a nonpower license is required to be denied.”

As a result, he did not consider the finding which is required by Section 15(b) of the Federal Power Act that “in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or any part of [the] licensed project should no longer be used or adapted for use for power purposes.”

The Bands and Interior contend on exception that the Bands’ proposal for a nonpower license is superior to Mutual’s and Escondido’s proposal for a power license, but they largely ignore that requisite statutory finding. Instead, they argue (1) that “the San Luis Rey can now fulfill the same function for the Bands as it once did for Vista and Escondido” by making those cities economically sound, vital and growing communities, (2) that Mutual’s shareholders rather than the public would be the primary beneficiaries of a power license to Mutual, (3) that the greater parts of Escondido’s and Vista’s water supplies are used for higher-rate domestic consumption and as a result their water

⁸¹Until the water is needed for irrigation of their reservation lands, the Bands would sell it presumably to Mutual, Escondido and/or Vista and thereby export it from the San Luis Rey watershed.

users can afford more-expensive alternative supplies, (4) that Lake Wohlford will be improved as a fishery since its elevation would no longer fluctuate for water storage and the La Jolla Indian Reservation fishery will also be improved since, "We would seek to schedule releases from Lake Henshaw so as to maximize fishery benefits", (5) that Indian reservations cannot be converted or transferred to the use and benefit of non-Indians under the guise of the Federal Power Act, (6) that Mutual has abused its license and (7) that the reasons cited by the presiding judge for denying jurisdiction make Project No. 176 a "perfect candidate" for the Commission's first nonpower license.

Parameters of a Nonpower License

The Bands' case for a finding that "all or any part of [the] licensed project should no longer be used or adapted for use for power purposes" initially was premised upon a 1962 evaluation report which was prepared for Mutual in connection with the 1963 agreement in principal to sell Mutual's assets to Escondido. That report indicated that the direct expenses of the Rincon power plant exceeded its revenues, and the return on the Bear Valley power plant would not pay the interest on its replacement cost. Later information in the record indicates, however, that the revenues from the two power plants were expected to exceed their operation and maintenance costs by a healthy margin during the 1973-74 period in view of sharply rising fuel costs and resulting power rates, and the fact that water power plants utilize no fuel.⁸²

⁸²As the arguments point out, most of the generating equipment involved herein is more than 60 years old and could break down irreparably at any time or continue functioning through the life of another license. So long as they are functioning and not proposed to be replaced, it is premature to consider questions pertaining to their possible replacement.

We take official notice, in this connection, of Mutual's Form 1-F

The fact that water power plants utilize no fuel weighs heavily against a finding that the Rincon and/or Bear Valley power plants, or any other part of Project No. 176 which supplies water to those facilities, should no longer be used or adapted for use for power purposes. Water is a renewable resource, and the emerging national energy policy favors greater utilization of all renewable resources for the production of electric energy. One of the purposes of the Department of Energy Organization Act is "to place emphasis on the development and commercial use of solar, geothermal, recycling and other technologies utilizing renewable energy resources." 42 U.S.C. § 7112(6). And Title IV of the Public Utility Regulatory Policies Act of 1978 provides for the establishment of a program to encourage the development of small water power projects in connection with existing dams which are not being used to generate electric power.⁸³

reports for the years ended June 30, 1975, 1976 and 1977, from which the following figures pertaining to sales of electricity are taken:

	<u>1975</u>	<u>1976</u>	<u>1977</u>
Kilowatt-hours	2,869,500	3,124,100	2,936,300
Operating revenues	\$ 83,615	\$ 97,148	\$ 100,976
Operating expenses	<u>\$ 45,415</u>	<u>74,672</u>	<u>45,961</u>
Net operating income	\$ 38,200	\$ 22,476	\$ 55,015

⁸³An April 1978 Commission publication entitled "Water Power" states,

"Hydroelectric plants depend upon water, which is a renewable resource because of the recurring cycles of rainfall, runoff, and evaporation. Hydroelectric plants do not consume water, heat the water of streams, or contribute to air pollution. These favorable characteristics, combined with increasing shortages and costs of fossil fuels, make hydroelectric power an increasingly attractive choice as a source of electric power generation."

The same publication indicates that a recent study identified 47,000 dams in the United States which are 25 feet or higher at which no electricity is generated, although 54,100 megawatts of generating capacity could be developed at those dams. And it also indicates that the Department of Energy has been appropriated \$10,000,000 for research,

(footnote continued on following page)

As indicated, the generation of electric power is and always has been incidental to the primary purpose of Project No. 176 of conveying water for domestic and irrigation consumption, and the power generated by the project is and always has been unimportant to SDG&E. Nonetheless, if Project No. 176 were to cease generating electric power SDG&E would thereby be forced to obtain approximately 4,000,000 kilowatt-hours annually from other sources. And the most likely sources would require the consumption of fossil fuels consisting of 6,340 barrels of fuel oil or 37,800 Mcf of natural gas annually, or some combination of the two.

In view of the fact that the electric operating revenues are exceeding the electric operating expenses of Project No. 176, and in view of the emerging national energy policy favoring greater utilization of renewable resources in generating electric power, we are unable to find in conformity with a comprehensive plan for beneficial public uses that any part of Project No. 176 should no longer be used or adapted for use for power purposes.⁸⁴

development and demonstration focusing upon low head (less than 65 feet) hydroelectric power, to supplement the high head power which characterized this country's hydroelectric development during the first half-century under the Federal Power Act.

In addition, and in furtherance of national policies for conserving fossil fuels, the Commission, in Order No. 11 issued September 5, 1978, adopted a simplified procedure and format for processing applications for certain small-scale hydroelectric projects.

⁸⁴As indicated, however, Mutual and Escondido propose the construction of 8,550 feet of 48-inch pipeline principally on non-reservation lands, a sequential abandonment of approximately 12,000 feet of conduit on the eastern portion of the San Pasqual Indian Reservation and the restoration of the abandoned right-of-way. Since the license issued herein requires the Licensees to provide water to the eastern portion of the San Pasqual Indian Reservation, the San Pasqual Band might wish to utilize the 12,000 feet of conduit to convey water through that portion of its reservation instead of having the abandoned right-of-way restored.

Apparently the Bands recognize that it would be imprudent to attempt to persuade the Commission to scrap functioning and useful generating facilities utilizing a renewable resource, no matter what their age. As a result the Bands say that they will maintain the Rincon and Bear Valley power plants until a major breakdown occurs, and then they will sell those facilities for scrap. We find that their plan to continue generating power is inconsistent with the concept of a nonpower license.⁸⁵

A nonpower license is a temporary license which is intended to fill the regulatory gap between the time the Commission orders that all or part of any licensed project should no longer be used or adapted for use for power purposes, and the time some other regulatory body assumes regulatory supervision of the lands and facilities included under the license. Timewise, it is of indefinite duration; and powerwise, it requires the termination of all usefulness for power purposes at or prior to the time of its termination.⁸⁶ The Bands propose to continue to generate electric power even after regulatory supervision would pass to Interior and, as a result, they cannot have a nonpower license.⁸⁷

⁸⁵Their plan for irrigation is also inconsistent with that concept. The Bands speak of developing water power on a conduit which they would construct north of the San Luis Rey River to convey irrigation water. Because that conduit would occupy public lands and reservations of the United States, the Bands would be precluded by Section 23(b) from constructing, operating and maintaining those water power facilities without a license under the Federal Power Act.

⁸⁶As recommended by the Federal Power Commission and as introduced in both the House and the Senate, the bill which eventually became Section 15(b) in 1968 contained the sentence, "Licenses for nonpower use shall be issued on condition that any existing power facilities shall be removed or otherwise disposed of as directed by the Commission." The sentence was deleted in what was characterized as a technical and clarifying amendment.

⁸⁷If the Bands were to continue to generate electric power after a nonpower license is terminated, they would violate Section 23(b) which prohibits them, for the purpose of developing electric power, from operating and maintaining the Escondido Canal and the Rincon powerhouse, among other project works, upon the public lands or reservations of the United States without a license under the Federal Power Act.

Water Rights (Article 28)

A nonpower license will not be issued to the Bands because we are unable to find that any part of Project No. 176 should no longer be used or adapted for use for power purposes, and because the Bands' proposal to continue generating power is inconsistent with the concept of a nonpower license. Because of the absence of judicial and Commission precedent with respect to nonpower licenses, and because the Bands' proposal is consistent with the concept of a power license,⁸⁸ we will treat their application as one for a power license and address its merits from that viewpoint. What is said, however, also addresses the merits of their application from the viewpoint of a nonpower license and, as a result, we find on the merits of the Bands' application that neither a power license nor a nonpower license should be issued to them.

Furthermore, we find it unnecessary to address every aspect of the merits.⁸⁹ With respect to both power and nonpower licenses, the Commission is required to consider the prospective ability of the applicant or applicants to carry out the comprehensive plan for beneficial public uses which is proposed in the application. The presiding judge addressed some of the underlying considerations, such as the availability of capital, personnel and technical resources. We agree in substance with the presiding judge that the

⁸⁸As noted, the Bands would sell surplus water presumably to Mutual, Escondido and/or Vista until it is needed for irrigation of their reservation lands and, as a result, Project No. 176 water presumably would be available at the Bear Valley power plant for many years. Furthermore, since water delivered to the Rincon Indian Reservation ordinarily passes through the Rincon power plant, the Bands' proposal is easily conditioned upon the continued generation of electric power at one or both of those facilities.

⁸⁹*Deep South Broadcasting Company v. Federal Communications Commission*, 278 F.2d 264, 266 (CA-DC, 1960).

Bands must surmount a serious water rights obstacle in establishing their ability to carry out their ambitious irrigation program, and that their application should be denied on the merits for that reason.

The water rights issue centers upon the interaction of Sections 9(b)⁹⁰ and 27⁹¹ of the Federal Power Act. The Commission must satisfy itself as contemplated by Section 9(b) that applicants for water power licenses have whatever rights are necessary to utilize the water in question in the manner contemplated by their applications and, ultimately, in the manner required by the resulting licenses. But the Commission has taken the position at least since 1932 that in view of Section 27 the Commission "has no jurisdiction to adjudicate private rights to the use of water or property where such rights or property, as in the case of the right to use water for irrigation, is vested in the jurisdiction of the State." *East Bay Municipal Utility District*, 1 FPC 12, 13 (1932).

The Supreme Court said, in this connection, in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), at page 178,

" . . . [The] Commission will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of the legal title of the applicant to its riparian rights. . . . Section 9(b) says that the Commission may wish to have 'satisfactory evidence' of the progress made by the applicant toward meeting local requirements but it does not say that the

⁹⁰Footnote 58, *supra*.

⁹¹Section 27 provides,

"That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

Commission is to assume responsibility for the legal sufficiency of the steps taken."

The Bands' and Interior's position on exception is not clear. At one point they suggest finessing the water rights issue through a license which would permit the Bands to operate and maintain the Escondido Canal. They indicate that Mutual and Vista could not exercise their respective water rights under such a license since they (Mutual or Vista) would not have facilities, without the Bands' consent, to convey San Luis Rey water to their service areas. Such a suggestion, however ignores (1) the Commission's obligation contemplated by Section 9(b) to satisfy itself that the prospective licensees have the necessary water rights, and (2) that water rights incident to a project are paid for by, and, consequently, are transferred to the new licensees of the project.⁹² In any event, the project which is best adapted to a comprehensive plan for beneficial public uses would exclude an arrangement, such as the one suggested, which might result in a standoff between those having water rights and those having conveyance rights.

The Bands' and Interior's foregoing suggestion highlights the untenability of the Bands' application for a license. They contend that irrigation of the Bands' reservation lands is best adapted to a comprehensive plan and, if they are right, it is obvious (1) that the Bands must have irrigation waters

⁹²Section 3(11) defines the term "project" as including all water rights, the use of which are necessary or appropriate in the operation of the complete unit of development. Section 15(a) authorizes the Commission to issue new licenses to new licensees under certain circumstances on the condition that the new licensees pay the amounts specified in Section 14(a) in the case of takeover by the United States. And Section 14(a) requires the payment of the "net investment of the licensee in the "project . . . not to exceed the fair value of the property taken", plus severance damages; and it specifies that "the values allowed for water rights" shall not "be in excess of the actual reasonable costs thereof at the time of acquisition by the licensee."

available during the summer agricultural months to carry out their program, and (2) that the Bands must gain control of the Henshaw facilities together with the water rights which are incident to those facilities in order to obtain such summer irrigation waters. Accordingly, if a new license for the existing Project No. 176 is issued to the Bands, they would pay Mutual for, and acquire by license, the water rights which are incident to the existing Project No. 176. Those are Mutual's predecessor's rights to the appropriated 100,000 miners inches of natural flow,⁹³ limited by the Rincon Band's appropriated rights and possibly other rights claimed by the Bands. Assuming *arguendo* that the Bands could also acquire by license Vista's Henshaw facilities and the incident water rights, Vista is a municipality and, therefore, we would construe Section 15(a) and the Act of August 15, 1953 (see Federal Takeover Not Recommended), as requiring the Bands to pay Vista just compensation, as distinguished from net investment plus severance damages. As a result, the Bands would have to pay a substantial amount, if they can obtain the funds, in order to acquire by license the summer irrigation waters which are the *sine qua non* of their proposed agricultural program.⁹⁴

It is possible, of course, to give the Bands access to summer irrigation waters by issuing a license to them jointly with Vista and requiring Vista to bring Henshaw Dam, Lake Henshaw and the associated pumping facilities and water rights into the ambit of the license. But such an arrangement

⁹³As noted, they have been quantified at 4,143 acre-feet annually from November 1 through the following July 1.

⁹⁴Since nonpower licenses are limited to licensed projects and parts of licensed projects, and since Vista's Henshaw facilities and the incident water rights are not currently part of Project No. 176, a nonpower license could not possibly provide the Bands with summer irrigation waters.

hardly seems workable and, in any event, it cannot be best adapted to a comprehensive plan for beneficial public uses, in view of the inherent conflict between Vista's interest in diverting the San Luis Rey waters into the Escondido Canal for export from the watershed and the Bands' interest in retaining them within the San Luis Rey watershed.

The Bands and Interior assert on exception that in terms of the application of Section 27 to this case, the two most important cases construing that provision are *Portland General Electric Co. v. Federal Power Commission*, 328 F.2d 165 (CA9, 1964)⁹⁵ and *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463 (CA2, 1971). In *Scenic Hudson* it was argued that a proposal to construct an underground powerhouse endangered the Catskill Aqueduct system, one of three systems which supply New York City with substantially all of its water, and that such endangerment interfered with New York City's control of the Catskill Aqueduct system and was, therefore, prohibited by Section 27. The Second Circuit noted that the Commission's license did not authorize diversion of the city's water or interference with a particular aqueduct tunnel; and in that context, and without analysis, it quoted with approval the Ninth Circuit's statement in *Portland General Electric*, 328 F.2d, at page 176,

⁹⁵In *Portland General Electric* it was argued that Section 27 precluded the Commission from including in a license two articles which imposed navigation conditions in exercise of the Commission's authority under Section 11. The Ninth Circuit said that Section 27, like Section 8 of the Reclamation Act of 1902, was a general provision preserving state law which could not override other specific provisions of the Federal Power and Reclamation Acts and, consequently, Section 27 did not preclude the Commission from exercising its power specifically vested by Section 11. The Ninth Circuit then said that Section 27 preserved to holders of state-conferred water rights a right to compensation if those rights are taken or destroyed as an incident to the exercise by another, of a license granted by the Commission.

"The only purpose of section 27 is to preserve to holders of state-conferred water rights a right to compensation if those rights are taken or destroyed as an incident to the exercise by another, of a license granted by the Commission." (Emphasis by the Bands and Interior.)⁹⁶

Of importance to this proceeding, the Supreme Court in *California v. United States* traced the legislative history of Section 8 and said, (Slip Opinion, at page 18),

"The [reclamation] projects would be built on federal land and the actual construction and operation of the projects would be in the hands of the Secretary of the Interior. But the Act clearly provided that state water law would control in the appropriation and later distribution of the water."⁹⁷

If today unappropriated waters were available in the San Luis Rey River, and if Mutual were to appropriate those

⁹⁶The Ninth Circuit indicated by footnote that it relied upon *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 291 (1958) and *City of Fresno v. California*, 372 U.S. 627, 629-30 (1963), which cases construed the substantially identical Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383.

"[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the law of any States or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested rights acquired thereunder. . . ."

In *California v. United States*, — U.S. —, decided July 3, 1978, the Supreme Court disavowed certain dictum statements in *Ivanhoe* and *City of Fresno* pertaining to Section 8 of the Reclamation Act, but also reaffirmed the authoritative precedent of those decisions.

⁹⁷The Supreme Court also said in a footnote (Slip Opinion, at page 22),

"In previous cases interpreting § 8 of the 1902 Reclamation Act, however, this Court has held that state water law does not control in the distribution of reclamation water if inconsistent with other congressional directives to the Secretary. See *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958); *City of Fresno v. California*, 372 U.S. 627 (1963). We believe that this reading of the Act is also consistent with the legislative history and indeed is the preferable reading of the Act."

waters under California law under conditions which would require Mutual to convey those waters to Escondido for domestic and irrigation consumption, and if the Commission were to determine pursuant to Section 10(a) that the project which is best adapted to a comprehensive plan for beneficial public uses would require delivery of those waters to the Bands, the Commission would be confronted with a direct conflict between California water law and the Federal Power Act. But no party has called to our attention any requirement of California law that the waters appropriated by Mutual's and Vista's predecessors be delivered to the Escondido and Vista service areas. While *California v. United States* suggests that such a conflict must be resolved in favor of the Federal Power Act,⁹⁸ we are unaware of any reason in law or fact why we could not make such a Section 10(a) determination in favor of the Bands if the merits of the situation so require.⁹⁹

⁹⁸ Accord, *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), wherein the Supreme Court said, 328 U.S., beginning at page 167.

"In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. . . . Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. In fact a contrary policy is indicated in §§ 4(e), 10(a), (b) and (c), and 23(b). In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission." (Footnote omitted.)

⁹⁹ The Bands and Interior argue that the "Commission has no choice other than to issue a new license to the original licensee" if water rights incident to a project are protected by Section 27. We believe, however, that their argument (1) assumes that any new license which includes Mutual as a licensee will necessarily require Project No. 176 to be operated in essentially the same manner as it is currently operated, and (2) confuses two issues, (a) the identity of the new licensee(s) and (b) the parameters of the comprehensive plan for beneficial public uses.

The Supreme Court quoted Congressman Mondell with approval (Slip Opinion, at page 23),

“ ‘Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in that regard.’ ”

The legislative history of Section 27 of the Federal Power Act clearly indicates that it was derived from Section 8 of the Reclamation Act to assure that the same policy would become part of the Federal Water Power Act.¹⁰⁰

We turn then to the Bands' and Interior's contention that Mutual and Escondido cannot satisfy the requirements of Section 9(b) because Mutual cannot provide “satisfactory evidence”, in view of the Bands' water rights claims, that Mutual has the water rights which are necessary to carry out its joint proposal with Escondido. Although the Bands

Their implied assumption is incorrect because a new license including Mutual could, in effect, require the licensees to provide water to carry out the Bands' agricultural program, and a new license to the Bands could require them to operate the project as at present for the benefit of the inhabitants of the Escondido and Vista service areas. The Bands and Interior therefore argue correctly that any new licensee(s) of Project No. 176 will acquire by license the water rights which are incident to that project, but questions pertaining to what the new licensee(s) will be required to do with those water rights will depend upon other considerations, such as Commission determinations under Section 10(a), the parameters of the water rights (particularly if the water covered by them has any required destination under State law) and possible conflicts between State law and the Federal Power Act.

The Bands' and Interior's assumption, and their confusion of the two issues, is understandable, however, in view of the fact that the competing groups of applicants in this proceeding advocate markedly different comprehensive plans which are closely associated with their respective interests, and the assumption that under such circumstances a license would best be issued to the group which is more closely associated with the comprehensive plan which is ultimately developed.

¹⁰⁰51 Cong. Rec., August 15, 1914, page 13816; 51 Cong. Rec., August 20, 1914, page 14067; *First Iowa*, *supra*, footnote 20, 328 U.S., beginning at page 176.

and Interior expressly "acknowledge that the Commission is without jurisdiction to adjudicate the merits of the existing water rights controversy between the Bands and Mutual and Vista", nonetheless, they seem to say indirectly that the Commission is bound to do so to satisfy itself that the prospective licensees have the necessary water rights.¹⁰¹

As to Mutual, the record contains evidence to the effect that in the 1890's Mutual's predecessor complied with California law with respect to the appropriation and diversion of a substantial portion of the San Luis Rey waters. Furthermore, Mutual and its predecessor had in fact appropriated and diverted those waters for almost 30 years, and Mutual was continuing to do so, when the Federal Power Commission in 1924 issued the initial license for Project No. 176. The Commission found, and said in the license, that

"the Licensee has submitted to the Commission satisfactory evidence of its compliance with the laws of the State of California as required by Section 9, subsection (b) of the Act, and the Commission is satisfied as to the ability of the Licensee to carry out the plans for said project as filed with said application. . . ."

And finally, there is no suggestion that Mutual's water rights are limited in time or otherwise, so as to prevent Mutual from operating and maintaining Project No. 176 for another term except insofar as those rights may be limited by some future court decision in the pending litigation concerning them.

¹⁰¹We find that many of the arguments are directed toward imposing license conditions for providing water to the Bands, rather than to the broad issue posed by the Bands and Interior.

As to Vista, the record contains evidence to the effect that in the 1910's Vista's predecessor also complied with California law with respect to the appropriation and diversion of a substantial portion of the San Luis Rey waters. Furthermore, Vista and its predecessor have in fact appropriated and diverted those waters for more than 50 years, and Vista is continuing to do so without possessing any Federal license other than a permit to occupy a small portion of the Cleveland National Forest. And, as in the case of Mutual, there is no suggestion that Vista's water rights are limited in time or otherwise, so as to prevent Vista from operating and maintaining Project No. 176 for the term of a new license, except insofar as those rights may be limited by some future court decision in the pending litigation concerning them.

Under such circumstances, we find that Mutual and Vista have submitted to the Commission satisfactory evidence of their compliance with the laws of the State of California as required by Section 9(b). Insofar as concerns their rights to water, we are satisfied as to their ability to operate and maintain Project No. 176, subject to the terms and conditions of the new license, except insofar as those rights may be limited by the ultimate disposition of the pending litigation. The Bands base their claims to that water, not upon compliance with the laws of the State of California,¹⁰² but upon the Winters doctrine and other laws which they said void certain agreements pertaining to that water. Those unlitigated claims do not preclude us from continuing to be satisfied with the evidence submitted by Mutual and Vista pursuant to Section 9(b). Accordingly, and insofar as con-

¹⁰²Other than the Rincon Band of Mission Indians, which complied with the laws of the State of California with respect to the appropriation and diversion of a small portion of the San Luis Rey waters.

cerns their rights to water, the Bands will not be in a position to nullify that evidence and submit their own evidence of having the necessary water rights to carry out the comprehensive plan for beneficial public uses which is proposed in their application until they are able to submit a document finally disposing of the pending litigation in their favor. The Commission was not intended to be, and is not, a forum for litigating disputed water rights.¹⁰³

Since Mutual's license for Project No. 176 was issued for the maximum lawful term and expired almost five years ago, and in view of other considerations, we find that it is not in the public interest to defer action on the pending applications until final resolution of the pending litigation concerning the water rights incident to that project. Accordingly, we are issuing a new license and are including in Article 28 a broad condition which authorizes any modifications considered appropriate by the Commission in conjunction with or following the final disposition of the pending or any substituted litigation involving the water and related contractual rights which are incident to Project No. 176.

Water is a scarce commodity in Northern San Diego County and must be conserved, and the Bands cannot utilize immediately on their reservations all or even a substantial part of the San Luis Rey water which is currently diverted to the Escondido and Vista service areas. As a result, it is assumed that any redirection of the ultimate destination of that water which might be required by the disposition of the pending litigation should take place over an extended period

¹⁰³In *First Iowa, supra*, the Supreme Court emphasized that while Section 27 saves State law as to property rights to water, Section 9 is devoted to securing adequate information for the Commission to act on pending applications for licenses. There is an extended discussion of the two sections at 328 U.S. 175-82.

of time, as in the case of the Bands' and Interior's proposals in this proceeding. Article 28 is intended to accomodate the necessary adjustments within the framework of the license issued by this Opinion and order to Mutual, Escondido and Vista.

FEDERAL TAKEOVER NOT RECOMMENDED

Section 7(c) of the Federal Power Act provides, in addition to Section 14 (see Footnote 9),

“Whenever, after notice and opportunity for hearing the Commission determines that the United States should exercise its rights upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.”

Furthermore, § 16.9 of the Commission's Regulations Under the Federal Power Act, 18 CFR § 16.9, provides,

“If the Commission, after notice and opportunity for hearing concludes upon departmental recommendation, a proposal of any party, or its own motion, that the standards of Section 10(a) of the Act would best be served if a project whose license is expiring is taken over by the United States, it will issue its findings and recommendations to this effect, and . . . forward copies of its findings and recommendations to the Congress.”

As discussed more fully in the following sections of this Opinion and order, an evaluation under the standards of Section 10(a) of the Federal Power Act has been made with respect to resource conservation, water quality, recreation, fish and wildlife, flood control and economic considerations. And, as a result of that evaluation, the Commission finds (1) that Project No. 176 is best adapted to compre-

hensive development of the San Luis Rey and Escondido Canal and Creek waterways upon compliance with the terms and conditions of the power license issued herein, and (2) that any useful objectives obtained by takeover of Project No. 176 or a part thereof are outweighed by operation and maintenance of the project by Mutual, Escondido and Vista and, consequently, that the public interest is best served through issuance of the license. *Pacific Gas and Electric Company*, Project No. 619, 52 FPC 1898, 1901 (1974).

While the power license issued herein is different from that sought by Mutual and Escondido, and includes Vista's property against its will, and gives the Bands and Interior less than they want, we believe that on balance it provides the best possible workable plan for the available water supply in the light of all the competing interests. We know of no reason why takeover by the United States would better serve the standard of Section 10(a) and, therefore, takeover of Project No. 176 is not recommended to Congress.

The consideration resulting in our decision not to recommend takeover by the United States are the same as those resulting in our rejection on the merits of a power or non-power license for the Bands, and those resulting in the special license conditions which give shape and dimension to the comprehensive plan for beneficial public uses which is developed herein. As stated in the Bands' and Interior's brief on exceptions,

"Interior's proposal in the event of recapture will accomplish the same overall purposes as the Bands' application for a nonpower license. The Bands' application is more in keeping with contemporary Indian policy, specifically the policy of Indian self-determination. . . . In the judgment of the Interior Department, the Bands should have primary responsibility for operating and managing the project; it should be run by

them, not for them, with the BIA available to provide technical and other assistance as needed."

The foregoing statement appears to contradict Interior's recommendation of May 22, 1972, as supplemented October 18, 1972, which advocates that the United States rather than the Bands should operate the recaptured portion of the project, and that the project should be operated "for the benefit of all who have a right to use the water therefrom" rather than for the benefit of the Bands as such.

The Escondido area has relied upon the availability of San Luis Rey water for more than 80 years, and the Vista area, for more than 50 years. If Congress enacts legislation to authorize Interior to take over Project No. 176 or a portion of the project, Congress will in effect take that long-established water resource from those areas and confer it upon the Bands.¹⁰⁴ Interior has not indicated the standards which were applied in reaching its decision to recommend such action and, as has been shown, there appears to be a conflict between Interior's 1972 proposal and its current justification that its Bureau of Indian Affairs has a fiduciary relationship to the Bands and to Indians generally, and that it is attempting to carry out congressionally mandated objectives of Indian-oriented legislation. Whatever standards Interior may have applied, the Bands and Interior have failed to persuade us that the standards of Section 10(a) would best be served through takeover pursuant to Interior's recommendation or most recently stated justification.

The presiding judge in effect applied the standards of Section 10(a) and concluded that "there is no need for, and so no occasion to recommend federalization by act of Con-

¹⁰⁴ Additionally, and contrary to our national energy policy, Congress will in effect authorize the termination of the production of power from a renewable resource at the Rincon powerhouse.

gress." The Bands and Interior take exception; and since Interior has recommended takeover of part of Project No. 176, it is necessary to address the relevant issues.

In view of the fact that Section 14(a) of the Federal Power Act speaks of taking over "any project or projects . . . covered in whole or part by the license", we have considered whether recapture of only part of a project is permissible. And in view of the fact that Vista is a "municipality" and owns a part of Project No. 176, we have considered the effect of such ownership upon recapture in the light of the Act of August 15, 1953 (16 U.S.C. § 828), which provides, in pertinent part,

"Section 14 of the Federal Power Act pertaining to the taking over by the United States of any project upon or after the expiration of a license . . . shall not be applicable to any project owned by a State or municipality, and such rights and requirements shall not exist under any license heretofore or hereafter granted to any State or municipality."

These seemingly unrelated inquiries have a common solution in the last proviso of Section 14(a),

"That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved."¹⁰⁵

The Federal Power Commission explained the purpose of the foregoing portion of the Act of August 15, 1953, as

¹⁰⁵While the Bands argue that they are "municipalities" within the meaning of certain other laws and that they should be accorded a preference as such under the Federal Power Act, we find that they do not come within the definition of "municipality" in Section 3(7). Accordingly, the Bands have no licensing preference as in the case of municipalities.

follows:

“The right of the United States to acquire or take over any project, regardless of the purpose served by the project, is conferred by the Constitution, and the acquisition must be in accord with the Constitutional authorization. Section 14 of the Federal Power Act does not confer upon Congress any right to acquire a licensed project but merely provides a formula under which the acquisition price can be determined in the event a licensed project is acquired by the United States at the end of the license period. Therefore, should [the bill] be enacted, the United States could still acquire or take over a project licensed to a State or a municipality by condemnation and upon payment of just compensation.”¹⁰⁶

In other words, neither Section 14(a) of the Federal Power Act nor the Act of August 15, 1953, changed the authority of Congress to take private property for public use in exercise of its various powers upon payment of “just compensation” as required by the Fifth Amendment to the Constitution.

The application of the concept of a project being a complete unit of improvement or development is sometimes arguable. Depending upon varying circumstances, Commission licenses are issued for multiple developments, single developments and portions of developments constituting projects. In view of the foregoing and the fact that the United

¹⁰⁶Senate Report No. 599 accompanying S. 2094, 83rd Congress, 1st Session, July 17, 1953. The hearings on S. 2094 and its counterpart, H.R. 6112, indicate that it was becoming increasingly difficult for States and municipalities to obtain financing beyond the term of a license in view of the fact that the licensed financed facilities were subject to recapture upon payment of their net investment in the facilities, plus severance damages. The hearings also indicate that such financing would be facilitated if the facilities were subject to condemnation under the Constitutional standard of just compensation.

States can take by condemnation part of a unit of improvement or development if it so chooses, it seems inappropriate that the question of whether the United States must pay the net investment plus severance damages under Section 14(a) or just compensation under the Fifth Amendment, should turn on fine points of the concept of what constitutes a project. For example, the Federal Power Commission treated Project No. 176 as a whole project in 1924, but today we treat it as only part of a larger unit of development including the Henshaw facilities and water rights. We therefore interpret Section 14(a) as permitting the United States to take over the entire Project No. 176 from the diversion dam to the Bear Valley tailrace upon payment of the net investment applicable to the entire project plus severance damages, and as permitting the United States to take over the portion of Project No. 176 from the diversion dam to the point of discharge into Lake Wohlford upon payment of the net investment applicable to that portion plus severance damages.

Although the Act of August 15, 1953, provides that Section 14 of the Federal Power Act shall not be applicable to any "project owned" by a State or municipality, we interpret it for the same reasons as applying to interests in projects which are so owned.¹⁰⁷ As a result, and in view of (1) our

¹⁰⁷Since the Commission licenses the construction, operation and maintenance of project works under the Federal Power Act, and since the Act of August 15, 1953, speaks of "project[s] owned" by States or municipalities, interpretative difficulties will arise when undivided interests in a project work are owned by a State or municipality, and by a non-State or non-municipality, or when one or more project works of a development are owned by a State or municipality, and one or more project works are owned by a non-State or non-municipality. Our interpretation that the Act of August 15, 1953, applies to interests in projects (developments) is consistent with the purpose of that Act in changing the payment formula to "just compensation" for licensed facilities which are owned by States and municipalities. Furthermore, States and municipalities may not have records which are adequate to determine their net investment in facilities since the Act of August 15, 1953, also exempts them from Sections 4(b), 301, and 302 pertaining to actual legitimate original costs and record and accounting procedures.

conclusion that under Section 8 Vista is subject to all of the provisions of the Federal Power Act to the same extent as though it were an original licensee, (2) the fact that Vista is a "municipality" and (3) the Act of August 15, 1953, Section 14 is not applicable to the interests in Project No. 176 which are owned by Vista, and Vista is entitled to just compensation for them.¹⁰⁸

Although we do not recommend that the United States take over Project No. 176 or any part of that project, we recommend in the event that Congress decides otherwise that the United States acquire Vista's Henshaw facilities and water rights by condemnation to provide a source of summer water. Our recommendation is based upon our finding that the Henshaw facilities are operated with the works of Project No. 176 as a single undertaking to supply water for domestic and irrigation consumption to the vicinities of Escondido and Vista, California. Furthermore, the Section 14 formula is not applicable in view of Vista's status as a "municipality" and the fact that the Henshaw facilities and water rights are not currently part of Project No. 176.

The staff takes exception to the presiding judge's failure to determine the amount of Mutual's net investment in Project No. 176, or at least the portion of that project proposed to be taken over by the United States, pointing out that Section 14(a) specifically requires the Commission to de-

¹⁰⁸Vista is entitled to just compensation for its undivided interest in the 48-inch pipeline which is jointly owned with Mutual, and Mutual is entitled to its net investment plus severance damages unless Congress chooses to pay just compensation. Vista is also entitled to just compensation for its penstock.

Since it appears possible to organize a "municipality" to take title to project works from a non-State or non-municipality to obtain just compensation instead of net investment plus severance damages, the Commission will consider such arrangements on a case-by-case basis. We are satisfied in this instance that Escondido's efforts to acquire Mutual or Mutual's assets for water supply purposes are bona fide.

termine both the net investment and the severance damages.

Neither the Federal Power Act nor the Commission's regulations thereunder specify *when* such a determination shall be made. Since the Commission is not either issuing a license to the Bands or joining Interior in recommending takeover, such a determination need not be made if Interior changes its position upon consideration of this Opinion and order and chooses not to move for a stay pursuant to 18 CFR § 6.10. We will, therefore, defer making such a determination until one is required.¹⁰⁹

LICENSING ISSUES

Sections 10(a) and 7(a)

Section 10 of the Federal Power Act prescribes in subsection (a) the Commission's fundamental mission in issuing both power and nonpower licenses and in considering development and takeover of power projects by the United States:

"All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other

¹⁰⁹It is assumed that Congress would want information pertaining to net investment and severance damages for its deliberations together with information pertaining to the fair value of property which may be condemned. On the other hand, 18 CFR § 16.11 specifies that "the licensee shall present to the Commission any claim for compensation consistent with the provisions of section 14 of the Federal Power Act and the regulations of the Commission" after Congress enacts takeover legislation, and it is assumed, further, that the amount of net investment and severance damages would be fixed as of the time of takeover.

beneficial public uses, including recreational purposes.

...¹¹⁰

Section 10(a) also grants the Commission's fundamental authority to carry out that mission:

"... and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."¹¹¹

The project adopted is essentially a product of the proposals in a licensing application, the contentions of interested parties and the expertise furnished by the Commission, its staff and others. The project which is best adapted to a comprehensive plan for beneficial public uses is neither fixed nor static and, as a result, the Commission's judgments with respect thereto can change over time and with conditions.

The project which is best adapted to a comprehensive plan for beneficial public uses in this instance involves the San Luis Rey River, which is a natural waterway, and the Escondido Canal, which is man-made. They have a common source of water, but since neither of them is navigable their possible use for the transportation of persons or property in interstate or foreign commerce is not a consideration. They have recreational values at Lakes Henshaw and Wohlford and at certain access points in the nine-mile reach of the

¹¹⁰The project which is so adopted in this Opinion and order is sometimes referred to herein as the "project which is best adapted to a comprehensive plan for beneficial public uses", the "comprehensive plan" or similar expressions extracted from Section 10(a).

¹¹¹This section focuses upon the Commission's exercise of its judgment in issuing a license to Mutual, Escondido and Vista, and rejecting the Bands' and Interior's proposals, and upon related legal issues. Factually related issues pertaining to the Commission's exercise of its modification authority are discussed *infra* under TERMS OF THE POWER LICENSE and TERMS OF THE TRANSMISSION LINE LICENSE.

San Luis Rey River between Vista's Henshaw Dam and Mutual's diversion dam, consisting principally of camping, boating and fishing.¹¹² There are also flood control values at Henshaw Dam and power values at the Rincon and Bear Valley powerhouses. But their most significant value, as all parties agree, comes from their ability to provide good quality and relatively inexpensive water for domestic and irrigation consumption in an essentially dry but fertile geographic area. Their water supply value, particularly as it relates to Henshaw-stored water for consumption during the dry summer period, dominates all other values in choosing among the competing proposals.

In issuing new licenses for previously licensed facilities the Commission is directed by Section 7(a) of the Federal Power Act to

"give preference to applications . . . by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans."

Having determined that the Bands are not "municipalities" (see Footnote 105), we do not reach or decide the question of whether municipalities have a preference under Section 7(a) over a prior non-municipality licensee, such as

¹¹²Swimming is not a recreational consideration because California law prohibits such use of municipal water supplies.

Mutual.¹¹³ Our decision is premised upon the superiority under Sections 10(a) and 7(a) of the joint Mutual/Escondido application. Assuming *arguendo* (contrary to our judgment) that the Bands' proposal is best adapted to develop, conserve, and utilize in the public interest the water resources of the region, our decision is also premised upon serious reservations as to the ability of the Bands to carry out their plans under a license or following takeover.

The presiding judge indicated that the Bands' irrigation program was not shown to be feasible because it requires rights to water together with Vista's cooperation in storing and delivering that water¹¹⁴ and, in addition, substantial amounts of capital for constructing irrigation facilities, preparing land, planting avocado and citrus trees and waiting for the first fruits. He said that the members of the Bands — about 600 on the reservations and an equal number elsewhere — could not be expected to raise the necessary capital through a stock offering or by mortgaging their government-restricted lands and, further, that Interior has not made any firm commitment to provide capital, even "to get things going." The Bands would raise capital, he indicated, by selling water which was not needed for irrigation during the early years of their program.¹¹⁵ And he concluded,

¹¹³Nor do we decide questions related to States or municipalities which are either applicants or joint licensees with non-States or non-municipalities.

¹¹⁴See THE BANDS' LICENSE APPLICATION IS DENIED — Water Rights, *supra*, and particularly the rejection therein of a possible Bands/Vista license. Cooperation between them appears to be unlikely for the additional reason that the Bands propose to sell some of the water to generate capital and to utilize some of their water-generated capital eventually to purchase Vista's Henshaw facilities and water rights.

¹¹⁵The Bands' and Interior's proposals thus appear to be supported financially by bootstraps. The Bands propose an irrigation program to obtain a license for Project No. 176, including the incident water rights, and they would then sell the water to generate capital and later utilize it for their program. Interior, on the other hand, proposes takeover by the United States so that Interior, acting for the United States, can provide the Bands with the water to generate capital and later utilize for the Bands' program.

“What is missing is any clear idea of the Bands’ substitute for the policy, fiscal, supervisory and management functions now performed jointly by the boards of directors of Mutual and of the Vista Irrigation District.”

We are in general agreement with the presiding judge’s foregoing assessment of the situation. The Bands and Interior contend in 263 pages of exceptions that their proposals are superior, and they conclude that it is time to change so that the purposes of the Bands’ reservations can be fulfilled. “The Indians deserve a chance.”

We agree fully that the Indians *deserve* a chance. But the Bands and the others tell us, in effect, that water is such a valuable commodity in Northern San Diego County that we, the Federal Energy Regulatory Commission, cannot *afford* to take that chance, or any chance, in selecting the licensees for Project No. 176. Mutual and Vista have been operating and maintaining the project and the Henshaw facilities for at least 50 years and have thus demonstrated their ability to continue doing so, even for the principal benefit of the Bands if the District Court should resolve the pending litigation in the Bands’ favor. But if the District Court were to resolve that litigation today in the Bands’ favor, and if a license were to be issued to the Bands and they fail to operate and maintain the project properly, then everyone — the Bands, as well as Mutual, Escondido and Vista — everyone would lose.¹¹⁶

¹¹⁶There appears to be some similarity among competing applications for licenses and corporate takeover and proxy contests. Since Section 7(a) requires that the Commission be satisfied as to the ability of competing applicants to carry out their plans, it would be helpful to the Commission for such applicants to refer to the corporate takeover and proxy contest rules of the Securities and Exchange Commission, particularly with respect to the type of personal and financial information which casts light upon their ability to do so.

The Bands and Interior assert on exception,

“Throughout the long trial in this case, one question stuck out, particularly during the California phases. Why are the Indians’ lands barren while adjoining lands of their white neighbors, which look the same, are intensively developed with citrus and avocado orchards? The answers are, we think, equally obvious. The primary reasons are interrelated: the lack of capital and the absence of a developed water supply other than the relatively meagre quantities that are now available to the Bands, primarily Pala and Rincon. The Bands’ and Interior’s proposal aims to correct both of these problems.”

We agree that the Bands’ reservations appear to be relatively impoverished compared to their neighboring lands¹¹⁷ because of a lack of capital and the absence of a *developed* water supply. But the Bands and Interior thereby imply that the Bands do not have water available to them, and we cannot agree with that implication. The water has been and still is available, although not in the quantities and not always at the times desired for the Bands’ ambitious irrigation program.

The development of a water supply requires, in addition to the water, adequate amounts of capital, initiative and everything else associated with the commencement and operation of a business enterprise. If the Bands had developed their available sources of water, that would have served as evidence that they have acquired the experience and skills which are essential to the successful operation of the larger program which they propose. But without that or some similar indication, we cannot afford to take any changes

¹¹⁷In addition to the relative barrenness of the reservations, the median resident family income is less than \$3,000 annually compared to \$9,300 for all families in Northern San Diego County.

with the San Luis Rey water supply by assuming that they have developed the necessary experience and skills.¹¹⁸

The Rincon, Pauma and Pala Indian Reservations overlie the Pauma and Pala Basins, which are underground storage reservoirs providing year-round sources of water. That underground basin water always has been and still is equally available to those Bands and to their neighboring landowners, and the latter have developed their citrus and avocado orchards notwithstanding the diversion of the San Luis Rey water for more than a half-century. The equal availability of the water and the fact that the particular Bands have not developed their reservations to the same extent as their non-Indian neighbors, indicate together that the Bands are not now prepared to carry out their ambitious agricultural program and take on the responsibilities of Project No. 176. While their reservations are barren, it is not because Project No. 176 has deprived them of water.¹¹⁹

¹¹⁸While the Bands obviously share a common interest in the San Luis Rey water as against Mutual, Escondido and Vista, which brings them together in this proceeding, we are unable to find a showing of a sufficient common interest among them, particularly of a commercial nature, which might serve as a nucleus for cooperative operation of Project No. 176 and an organized agricultural program. Indeed, the individual interests of particular Bands appear to conflict with the comprehensive plan which is adopted herein.

¹¹⁹The Bands and Interior fault the Initial Decision for not discussing Pauma and Pala Basin groundwater deterioration which, in their view, is "the most significant environmental aspect of this case."

A 1965 study of the California Department of Water Resources indicated that the groundwater within the Pauma Basin and the eastern half of the Pala Basin met the U.S. Public Health Service standards for drinking water and was excellent to good for irrigation, and that the groundwater within the western half of the Pala Basin was good to injurious for irrigation. However, the water from most wells on the Pala Indian Reservation met the drinking water standard and was excellent to good for irrigation. Groundwater downstream from the Monserate Narrows, in the Bonsall and Mission Basins, was poor to unusable.

Intensive agricultural development of the Pauma and Pala Basins began in the mid-1950's and was aggravated by the introduction in 1965 of low quality (high salinity) Colorado River supplemental irrigation water

Similarly, the La Jolla, Rincon and San Pasqual Indian Reservations are situated on the Escondido Canal and have water available to them under Article 14 of Mutual's 1924 license which provides,

which percolated into the two basins. The basins were, however, in hydrologic balance when they were studied in 1970.

A 1973 study of the Joint Administrative Committee of the Santa Margarita and San Luis Rey Watershed Planning Agencies projects a substantial increase in citrus and avocado acreage overlying the Pauma and Pala Basins. The study projects a corresponding sharp deterioration of those basins which, in turn, would result in a permanent increase of salinity and diminution of citrus and avocado yields. The projected increased acreage is roughly equivalent to the increased acreage under the Bands' proposed irrigation program and, as a result, the Bands and Interior take the position that additional releases of water into the basins are needed to counterbalance the increased withdrawals of water which the Bands contemplate.

Such releases would obviously benefit everyone who depends upon the Pauma and Pala Basins for domestic and irrigation water, including the Rincon, Pauma and Pala Bands and their non-Indian neighbors. But the Commission has no regulatory authority with respect to agricultural acreage. The Commission has no regulatory authority with respect to the number of wells which may be drilled into the basins, how deep they may be drilled and how much water may be withdrawn. And the Commission has no regulatory authority with respect to the construction of desalination facilities.

In 1974 Congress enacted the Safe Drinking Water Act, 42 U.S.C. § 300g *et seq.*, authorizing the Environmental Protection Agency to establish Federal standards for protection from all harmful contaminants, which standards are applicable to all public water systems, and establishing a joint Federal-State system for assuring compliance with these standards and for protecting underground sources of drinking water. U.S. Code Cong. and Adm. News, 93rd Cong., 2nd Sess., 1974, page 6454. The legislative history, and particularly the National Interim Primary Drinking Water Regulations Implementation at 40 CFR § 142, indicate clearly that the primary enforcement responsibility rests with the States.

Since Project No. 176 diverts water into the Escondido Canal which would otherwise percolate into the Pauma and Pala Basins, a permanent operating plan for that project as enlarged should attempt to recharge the groundwater within those basins to the maximum extent possible consistent with other beneficial public uses of the water. But in view of the limitations upon the Commission's authority in the light of the totality of the causes of the prospective groundwater degradation, and particularly in the light of the Safe Drinking Water Act, the primary control of the quality of the groundwater within the Pauma and Pala Basins rests with California and apparently its Department of Water Resources.

“The Licensee will interpose no objections to, and will in no way prevent, the use of water for domestic purposes by persons or corporations occupying lands of the United States under permit along or near any stream or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by this license.”¹²⁰

Additionally, the Rincon Band has water available under Article 24 which provides that the water rights incident to Project No. 176 are subject to the agreement of February 2, 1914. Admittedly, Article 14 water is not available when the Escondido Canal is closed for maintenance and repairs every fall, and Article 24 water is not available during periods of low natural flow. But Article 14 water is available in the canal during the dry summer months and, notwithstanding, the La Jolla, Rincon and San Pasqual Bands have made no organized effort to develop such supplies for domestic purposes.¹²¹

The San Luis Rey River, between Vista's Henshaw Dam and Mutual's diversion dam, contains some five to seven miles of the 22 miles of live stream in San Diego County,

¹²⁰ Although Article 14 speaks only of “domestic” consumption and of those occupying lands of the United States “under permit”, it is arguably construed to include agricultural consumption on homesites and to apply to the members of the La Jolla, Rincon and San Pasqual Bands. See TERMS OF THE POWER LICENSE — Licensees to Provide Water, *infra*.

¹²¹ It is understandable that the La Jolla Band individually has not attempted to develop a supply of San Luis Rey water because they never irrigated with such water and their reservation is largely mountainous. Similarly, the area comprising the San Pasqual Indian Reservation is partly outside the San Luis Rey watershed and is served in part by Valley Center water. The Rincon Band, on the other hand, could construct a dam across Paradise Creek and thereby develop the capacity to store water which is delivered to them through the Rincon penstock and powerhouse during the winter and spring months.

and is stocked annually with 25,000 trout. The releases of water from Lake Henshaw destined for Escondido and Vista produce a fairly constant flow in that reach of the river which, in turn, incidentally benefits the La Jolla fishery. But the water release regime, and particularly low flows during the months of September, October and November, limit the utilization and expansion of the La Jolla fishery. The Bands, under their proposal, would seek to schedule releases to maximize fishery benefits and recharge the Pauma and Pala Basins; but Vista has refused to alter the operating regime.

The matter should be explored in conjunction with the development of a permanent operating plan for Project No. 176, which plan should attempt to maximize the fishery benefits at the La Jolla Indian Reservation consistent with other beneficial public uses of the water.

Lake Wohlford is operated primarily for the storage of water and secondarily for recreation and, as a result, its level fluctuates an average of 15 to 16 feet each year, adversely affecting aesthetic and fishery values. Under the Bands' proposal Lake Wohlford would be operated primarily for recreational purposes and would be maintained at a more stable and higher level. On the other hand, less water would reach Lake Wohlford and it would gradually deteriorate. The Bands and Interior concede that appropriate license conditions would be required under the Bands' proposal to preserve the quality of Lake Wohlford.

Mutual and Escondido obtain approximately 35% of their water requirements through Project No. 176, and Vista obtains about 54%; and they obtain the remaining 65% and 46%, respectively, through MWD from the San Diego Aqueducts. Their San Luis Rey water is considerably better in quality, averaging 300 to 400 parts per million of dissolved solids, than the Colorado River water which they received

in recent years through the San Diego Aqueducts and which averaged 800 parts per million. However, they are now receiving or will soon receive through the Second San Diego Aqueduct a blend of Northern California and Colorado River water which should not be materially different in quality from their San Luis Rey water.

The matter of comparative costs is more complicated. All of the parties agree that San Diego Aqueduct water would cost more than San Luis Rey water,¹²² but they disagree as to how much and what should be included. According to Mutual, it would cost them \$915,646 more annually to purchase additional San Diego Aqueduct water; construct, operate and maintain a water storage facility on Escondido Creek; and purchase Vista's capacity in a joint filtration plant. According to Vista, it would cost them \$681,895 more annually to purchase additional water and construct, operate and maintain additional facilities. But the Bands contend that some of those facilities are not needed and others represent improvements rather than replacements, and that the total additional cost to both Mutual and Vista would be only \$400,000. In view of the nature of this proceeding it is not necessary to resolve the issues thus raised; it is sufficient to note the additional costs and their probable range.¹²³

¹²²The Bands and Interior assert, in this connection, that 70% of Escondido's water supply is consumed domestically, that 60% of Vista's water is so consumed, that those percentages are growing, that domestic water supplies customarily command higher rates than agricultural water supplies, at least in Southern California, and, as a result, that Escondido's and Vista's customers are better able to afford the higher water costs.

¹²³The Bands and Interior insist throughout their brief that the issuance of a license which includes Mutual as a licensee will result in a \$2,500,000 windfall to Mutual's shareholders, representing the portion of the acquisition price of Mutual's stock which they attribute to Project No. 176 and which will be repaid to Escondido over time by its water users. They contend that the \$2,500,000 is a windfall because the Project No.

The Banks and Interior contend on exception that under the Mutual and Escondido proposal no new lands will be brought under cultivation, no new economies will be developed, no groundwater basins will be recharged or preserved qualitywise, and no underutilized human resources will be made productive.¹²⁴ While they thereby infer that such benefits will accrue under their proposals, they concede that such benefits are possible only because Escondido and Vista have an alternative source of water.

Mutual, Escondido and Vista contend, on the other hand, that they will continue to generate clean non-polluting water power at the Rincon and Bear Valley power plants, provide free water and low cost power to the Rincon Band, provide quality recreational opportunities at Lake Wohlford, maintain roads within the Bands' reservations, utilize Henshaw Dam for flood control, and release water at Henshaw Dam

176 facilities, as such, were worth nothing upon the expiration of Mutual's 1924 license; because their value arises through the utilization of the La Jolla, Rincon and San Pasqual Indian Reservations under a new license; and because the Commission does not have authority to grant that permission. We do not agree that we do ~~not~~ have such authority since one of the purposes of the Federal Water Power Act of 1920 was to centralize in the Federal Power Commission authority to grant permission to utilize government lands, including lands reserved for Indians, for power purposes. In any event, we do not see the relevancy of the \$2,500,000 distribution to the selection of the comprehensive plan because the Bands and Interior contend that a license for the Bands or takeover would best serve the public interest and a license which includes Mutual would serve primarily private interests, and Mutual, Escondido and Vista say that a new license would best serve the public and a license for the Bands or takeover would serve the private interests of the Bands. In truth, all of the interests asserted in this proceeding partake of a mixed private and public character and, as a result, the labels applied by particular parties are not helpful in selecting the project which is best adapted to a comprehensive plan for beneficial public uses.

¹²⁴They also contend that no national policies will be implemented and no improvements will be made. But it has been shown that national energy policies will be implemented and a portion of the Escondido Canal on the San Pasqual Indian Reservation will be removed.

to make possible the recreational developments on the La Jolla Indian Reservation and upstream at the Forest Service campground.

The Escondido Canal has been conveying water from the San Luis Rey watershed to the Escondido area for more than 80 years and to the Vista area for more than 50 years. It was the first significant man-made water conduit in Northern San Diego County. Water and irrigation districts were formed, facilities were constructed, service areas were defined and patterns of water supply and distribution were developed as they are today in reliance upon the historic appropriations of the San Luis Rey River in the 1890's and the 1910's. We believe that the existing patterns should be disturbed as little as practicable consistent with the beneficial public uses of the water.

The economies of Escondido and Vista outgrew their San Luis Rey water supply and the two service areas were forced to obtain additional supplies through MWD from the San Diego Aqueducts. Their service area populations are continuing to grow and reached an estimated 64,000 persons in 1977 in the case of Escondido and 46,500 persons in the case of Vista.¹²⁵ Their consumption patterns are moving from agricultural to domestic, and are decidedly domestic. And Congress in 1974 enacted legislation to assure the safety of drinking water, thereby suggesting that the utilization of water for drinking and other domestic purposes should carry the highest priority.¹²⁶

¹²⁵Official notice is taken of the latest population estimates contained in Vista's Draft Environmental Impact Report of the Modification of Henshaw Dam and Warner Ranch Ground Water Program. They are consistent with earlier figures in the record.

¹²⁶See the Safe Drinking Water Act, House Report No. 93-1185, U.S. Code Cong. and Adm. News, 93rd Cong., 2nd Sess., 1974, at page 6457, wherein "safe water to drink" and "safe air to breathe" are called "the fundamental elements of life".

The Bands, on the other hand, want 32,000 acre-feet of water, which is more than the San Luis Rey River apparently can supply, to irrigate 10,500 acres of their reservations. Even though they have no actual need within the foreseeable future for all of the water which is conveyed through the Escondido Canal to the Escondido and Vista areas, the Bands would appropriate all of that water in apparent violation of the policy of the California State Water Resources Board.¹²⁷ And even though they have no actual need within the foreseeable future for all of that water, the Bands would reserve all of that water under the implied-reservation-of-water doctrine to enable them to raise capital by selling the amounts not needed for off-reservation utilization, in apparent violation of the implied-reservation-of-water doctrine as most recently addressed by the Supreme Court in *United States v. New Mexico*, *supra*.¹²⁸

On balance, we find that the joint Mutual/Escondido proposal to continue operating Project No. 176 in a manner

¹²⁷See *California v. United States*, *supra*, Slip Opinion at pages 6 and 7, wherein the Supreme Court quoted a condition imposed by the State Water Resources Control Board to the effect that the limited unappropriated water resources of California should not be committed to an applicant in the absence of a showing of the applicant's actual need for the water within reasonable time in the future. In our opinion, the Bands' showing of need lacks specificity, including their overall ability to carry out their irrigation program.

¹²⁸After finding in *United States v. New Mexico*, *supra*, that national forests are reserved for the purposes of conserving water flows and furnishing continuous supplies of timber, the Supreme Court held that the implied-reservation-of-water doctrine applies to water which is utilized for those purposes only and, conversely, that it does not apply to water which is utilized for secondary purposes of national forests, such as aesthetic, recreational, wildlife-preservation and stockwatering purposes. It would appear under the rationale of that decision that water is impliedly reserved for Indian reservations for domestic, agricultural and stockwatering *on-reservation* consumption and, conversely, that water is not reserved for the secondary purpose of improving Indians socio-economic status by its sale for *off-reservation* utilization. See Footnote 194.

similar to that which has been followed in the past, is superior to the Bands' and Interior's proposals for a license or takeover, and that it is particularly well suited to modification to accommodate the water needs of the La Jolla, Rincon and San Pasqual Bands, and to disturb the existing patterns of water supply and distribution only minimally and gradually. Although the joint proposal as modified will do less for the Pala and Pauma Bands than the Bands' and Interior's proposals, it should result in more recharging of the Pala and Pauma Basins than at present if the La Jolla fishery can reasonably be extended to year-round operation and/or if the agricultural utilization and irrigation of the Rincon Indian Reservation can be intensified. Article 34, in particular, requires the maintenance of a minimum pumped flow at the eastern boundary of the Pala Indian Reservation. But, for the reasons discussed in Footnote 119, the primary control of the groundwater within those basins rests with the State of California.

Accordingly, we find that the issuance of a license to Mutual, Escondido and Vista, subject to the terms and conditions specified therein, will be best adapted to a comprehensive plan for improving or developing the San Luis Rey and Escondido Canal waterways for beneficial public uses. We find, additionally, that the plan of Mutual and Escondido as conditioned in the license, including the plans of Vista, are best adapted to develop, conserve and utilize in the public interest the water resources of the region; and we are satisfied as to their ability to carry out such plans as conditioned.

Socio-Economic Issue

The Bands and Interior contend that a license should be issued to the Bands in furtherance of the national policies promulgated by Congress in various Indian-oriented legis-

lation, particularly the recent Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*,¹²⁹ and the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.* They state that the first of the two statutes is a major reason for Interior's support of the Bands' application for a license over its own takeover proposal.

We do not quarrel with the policies of those statutes or doubt their wisdom. They are, however, administered by Interior rather than by the Commission. The Federal Power Act in Section 4(e) prohibits the Commission from issuing licenses which interfere or are inconsistent with the purposes for which particular reservations are created or acquired. That Act in Sections 10(e) and (i) directs the Commission to fix reasonable annual charges for the use of lands within Indian reservations. But there is nothing in the legislative history of the Federal Power Act which indicates that the purposes for which it was enacted include the development and utilization of Indian human and physical resources. *National Association for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662 (1976). There is nothing in the legislative history to indicate that the Commission should give special consideration to Indian resources.

We agree with Mutual, Escondido and Vista that the Commission does not have broad authority to issue licenses

¹²⁹Congress declared its commitment at 25 U.S.C. § 450a(b) to "the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people to the planning, conduct, and administration of those programs and services." And at 25 U.S.C. § 450a(c):

"The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being."

to promote the welfare of the particular Bands. The Commission is required to choose among competing relicensing and takeover proposals in accordance with the directives of Sections 10(a) and 7(a) pertaining to beneficial public uses, water resources of the affected region and abilities to carry out the proposals, and socio-economic considerations are subsumed within those directives.

That is not to say that the Commission cannot condition licenses pursuant to its authority in Sections 10(a) and 10(g) to minimize adverse socio-economic consequences of a project.¹³⁰ Indeed, the Commission is directed by Section 102(1) of the National Environmental Policy Act of 1969 to administer the Federal Power Act in accordance with the policies set forth in Section 101(b), including in subsection (5) the policy of achieving "a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities". The Commission therefore has authority to condition a license for Project No. 176 to assure that the members of the Bands, to the extent practicable and as members of the public, will share the expected water benefits of the project.

The principal function of the Escondido Canal is to convey water from the San Luis Rey River, through a relatively low socio-economic environment, to sustain a relatively high quality of life in the Escondido and Vista areas. Although those whose lands are utilized to convey that water are entitled to reasonable rentals or annual charges, cash

¹³⁰In the Initial Decision issued September 20, 1976, in *Virginia Electric and Power Company*, Project No. 2716, the licensee was required to give financial assistance to a rural community to mitigate the impact from an influx of construction workers upon the community's expenditures for education, law enforcement, solid waste disposal, general government costs and welfare and other social services. Affirmed with minor modifications, Opinion No. 785, issued January 10, 1977.

payments alone are not sufficient compensation in that water-deficient environment. We find that it is appropriate and in the public interest that the La Jolla, Rincon and San Pasqual Bands be accorded an opportunity to utilize some of that water to achieve socio-economic equality with those whose environment is sustained by it. And we are conditioning the license issued herein pursuant to the authority of Section 10(a) to achieve that beneficial public use of the water, among others.

Applicability of Sections 4(e) and 15(a)

Section 4 of the Federal Power Act provides, in pertinent part,

“The Commission is hereby authorized and empowered—

* * *

“(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining . . . project works necessary or convenient . . . for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction . . . or upon any part of the public lands and reservations of the United States . . . or for the purpose of utilizing the surplus water or water power from any Government dam. . . .”

Section 15(a) provides, in pertinent part, that if the United States does not exercise its right to take over a project,

“[T]he Commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under

said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license. . . .”

The Commission staff, Mutual, Escondido and Vista contend that initial licenses for proposed or existing facilities are issued pursuant to Section 4(e) exclusively, and that new licenses for previously licensed facilities are issued pursuant to Section 15(a) exclusively. As a result, they contend that in issuing new licenses for previously licensed facilities the Commission does not have to make the finding and impose the conditions specified by the first proviso of Section 4(e), as follows,

“That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.”

The Bands and Interior contend, on the other hand, that new licenses for previously licensed facilities are issued pursuant to Sections 4(e) and 15(a) together. They claim that the Commission must make the finding required by the first proviso of Section 4(e), that it cannot do so and, as a result, that the Commission cannot issue a new license to Mutual. Furthermore, Interior has propounded twelve conditions to be included in a new license to Mutual, and they claim that the Commission must include them as propounded.

There is authority to support both positions. Among other provisions, Section 7(a) prescribes the Commission's mandate in “issuing licenses under section 15”, and Section 14(b) speaks of relicensing “pursuant to the provisions of

section 15'', in both cases, without also mentioning Section 4(e). Furthermore, the Federal Power Commission on December 19, 1974, acting under Section 15(a) exclusively, issued a new license to PGandE for its Project No. 619 (52 FPC 1898). The Secretary of Agriculture, who had submitted certain recommendations but was not a party to the proceeding, sought reconsideration of the Commission's failure to include the recommended measures in the new license, claiming that Section 4(e) required the Commission to do so. The Commission considered those recommendations again and, by order issued February 19, 1975, 53 FPC 523, rejected them again, stating at page 526,

"Initially we note that under the Act new licenses are issued under Section 15 rather than under Section 4(e). But even assuming that Section 4(e) were applicable in this proceeding the new license would not interfere or be inconsistent with the purpose for which such reservation was created or acquired. The authority to make such a finding is that of the Commission alone. Such a finding must be made, of course, in the light of and in accordance with the information of record in the proceeding. Thus, while the Commission gives great weight to the judgment and recommendations of the Department concerned, the Commission nevertheless must act on the basis of the record as a whole and must exercise its judgment to insure that the project, if licensed, meets the requirements of Section 10(a) of the Act." (Footnotes omitted.)

Section 15(a), on the other hand, authorizes the Commission to issue new licenses "upon such terms and conditions as may be authorized or required under the then existing laws and regulations", which would seem to include Section 4(e). Together, Sections 7(c) and 15(a) direct the Commission not to issue licenses and to issue licenses under specified circumstances, and in that context Section

15(a) provides independent authority to issue new licenses for previously licensed facilities. But Section 15(a) does not specify *to whom* such licenses may be issued¹³¹, *for what purposes* they may be issued¹³², or *on what jurisdictional bases* they may be issued¹³³, all of which are supplied by Section 4(e). Furthermore, a month after the Commission denied the Secretary of Agriculture's application for reconsideration pertaining to PGandE's Project No. 619, *supra*, the United States Court of Appeals for the District of Columbia Circuit held¹³⁴ that the Commission could issue annual licenses pursuant to Section 15(a) over the objections of the affected Indians, stating, 510 F.2d, at page 212,

"The issuance to Northern States [Power Company] of interim annual licenses is affirmed, and the question of whether the Section 4(e) determination can be made despite the Band's failure to assent to any further long-term licenses covering its tribal lands is left to the Commission for further consideration in the pending recapture-relicensing proceedings."¹³⁵

We find that Section 4(e) is applicable to the issuance herein of a power license to Mutual, Escondido and Vista because such action is partly an initial licensing of the Henshaw facilities and partly a relicensing of the presently licensed Project No. 176 facilities, and all of those facilities

¹³¹To citizens of the United States, associations of such citizens, certain corporations, States and municipalities.

¹³²For constructing, operating and maintaining project works, or utilizing surplus water or water power.

¹³³Bodies of water over which Congress has jurisdiction, public lands and reservations of the United States, and Government dams.

¹³⁴*Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Commission*, 510 F.2d 198 (CA DC 1975).

¹³⁵There are several indications in the opinion that Section 4(e) is applicable to relicensing. Furthermore, the recapture-relicensing proceeding involved in that opinion is pending before the Commission on exceptions to an Initial Decision.

are operated as a single undertaking.¹³⁶ The Project No. 176 which is being relicensed is so materially different from the Project No. 176 which was initially licensed in 1924 that little more than the project number remains the same and, as a result, it is appropriate that the issues raised by the first proviso of Section 4(e) be considered and addressed.¹³⁷ For that reason, and for the additional reason that our rationale in this initial contested recapture-relicensing decision is best understood by addressing those issues, it is inappropriate to invoke Section 10(i) to waive Section 4(e).

First Proviso of Section 4(e)

— Interference with Reservations

The Bands and Interior assert on exception,

“There is no conceivable way that the Commission can grant a new license to Mutual . . . and still make a finding that the license will not interfere or be inconsistent with the purpose for which the La Jolla, Rincon, San Pasqual, Pauma, Yuima and Pala Res-

¹³⁶Accordingly, we do not reach and will not decide the question of whether presently licensed facilities are relicensed pursuant to Sections 4(e) and 15(a) together or pursuant to Section 15(a) exclusively.

¹³⁷Mutual represented in the 1924 refile of its application for a license that the project did not involve the construction of any dams and that the San Luis Rey River was the source of its water. As a result, Project No. 176 was licensed as a run-of-the-river project, i.e., without licensing provisions for the operation of the Henshaw impoundment, even though it appears that the Federal Power Commission knew that the Escondido Canal was to be enlarged and would be used to convey water of San Diego County Water Company. Subsequent to the issuance of the license the diversion flows through the Escondido Canal were increased from an average of 4,344 acre-feet annually to an average of 14,600 acre-feet annually; the small diversion tunnel was replaced by a 16-foot high, 112-foot long concrete diversion dam and appurtenant works; and the project was operated as a single undertaking with the unlicensed Henshaw facilities, including the pumping facilities which were placed into service in the 1950's. Today, as discussed under JURISDICTION — The Henshaw Facilities and Water Rights, Project No. 176 is being licensed as including upstream storage.

ervations were established, as is required by Section 4(e).”

The Commission is not required to make such a finding with respect to all of those reservations. As indicated, the first proviso of Section 4(e) states, in pertinent part,

“That licenses shall be issued *within any reservation* only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which *such* reservation was created or acquired. . . .” (Emphasis added.)

Those words clearly mean that the interference/inconsistency finding is applicable only to those reservations which are to be occupied by project works. The Commission is therefore required to make such a finding only with respect to the La Jolla, Rincon and San Pasqual Indian Reservations if a license is to be issued to Mutual, Escondido and Vista. Furthermore, the finding is for the *Commission* to make, not the Bands or Interior, and the issue is whether the *license as conditioned* will interfere or be inconsistent with the purpose of those reservations.

The Bands and Interior do not focus their interference/inconsistency claim upon the physical occupation of large or strategic parts of the respective reservations because (a) some physical occupancy of a reservation is unavoidable in the issuance of a license within that reservation, (b) the physical intrusions in question are minor¹³⁶ and (c) the Bands

¹³⁶The diversion dam, caretaker's house, Escondido Canal and appurtenant works occupy approximately 3/10 of 1% of the La Jolla Indian Reservation consisting of mountainous terrain with little or no suitability for other uses. The Escondido Canal, Rincon powerhouse and appurtenant works similarly occupy about 7/10 of 1% of the Rincon Indian Reservation also consisting of mountainous terrain, except for the small amount of land occupied by the power facilities. And the Escondido Canal occupies 2.6% of the San Pasqual Indian Reservation consisting mainly of relatively low land which is suitable for other uses. As proposed by Mutual and Escondido, all but about 825 linear feet of open

would not remove those intrusions (except eventually the Rincon powerhouse) under their licensing proposal or Interior's takeover proposal. They contend, instead, (1) that "Any water that Mutual is licensed to take through Indian lands that could otherwise be utilized by the Bands necessarily interferes with the utilization of the reservation by the Indians" and (2) that the physical occupation of any reservation lands by non-Indians upon the Commission's authorization and without the respective Bands' consents necessarily interferes with their sovereignty over their reservations and their right of self-government.

Insofar as the Bands' and Interior's exception is bottomed on the deprivation of water to the La Jolla, Rincon and San Pasqual Indian Reservations, it is premised upon an assumption that Mutual and Vista would be permitted under a new license to continue to operate Project No. 176 as in the past and currently. Under such operation, an annual average of 14,600 acre-feet of San Luis Rey water is diverted into the Escondido Canal for conveyance to and consumption in the Escondido and Vista areas, except for a vague six cfs of natural flow (or three cfs during certain months of extremely dry years) to which the Rincon Indian Reservation is entitled. In considering a plan which will be

canal and 1,598 feet of pipeline conduit on the San Pasqual Indian Reservation will be replaced, and the remaining 825 feet of open canal running from higher to lower elevations will be fenced for safety.

The Bands and Interior correctly point out that the Federal Power Commission found in its order of February 4, 1977, pertaining to Southern California Edison Company's Project No. 120, that the occupation by transmission and telephone line rights-of-way of 9.6% of a relatively small (105 acre) Indian reservation, most of which was unsuitable for residential development, was inconsistent with the purpose of the reservation to provide an autonomous home for the Indians. The physical intrusions herein are materially smaller, not strategic to the purposes of the reservations, and involve a gravity water conduit which presumably would be much more difficult to relocate around the reservations than transmission and telephone lines.

best adapted to develop, conserve and utilize in the public interest the water resources of the region, as well as to a comprehensive plan for beneficial public uses, we have determined that Mutual, Escondido and Vista should be required to treat portions of the three reservations as a joint service area of Escondido and Vista, and to supply water from the Escondido Canal to that service area in such quantities as can be and are in fact utilized therein.

Specifically, Article 29 of the power license issued herein requires Mutual, Escondido and Vista to supply water to an Indian Service Area consisting of the portions of the La Jolla and Rincon Indian Reservations lying west (or downstream) from the contour passing through the crest of the spillway of the diversion dam and portions of the San Pasqual Indian Reservation through which the Escondido Canal passes. While this service requirement is discussed in greater detail under TERMS OF THE POWER LICENSE — Licensees to Provide Water, *infra*, it should be noted at present that unlike the Winters doctrine under which the three Bands or some of them may be found to be entitled to reserved natural flows, Article 29 will provide them with sufficient water for domestic, agricultural and stockwatering utilization throughout the greater part of the year¹³⁹ and particularly during the critical dry summer months.

¹³⁹When the Escondido Canal is closed for maintainance and repairs Escondido and Vista can provide water to their respective existing service areas from Lake Wohlford and/or the San Diego Aqueducts. However, such service to the Indian Service Area is precluded by geographic factors and, as a result, the three Bands will be required to continue to obtain their water from other sources when that conduit is closed. To the extent not currently practiced, consideration should be given to the performance of maintainance services upon the upper portion of the Escondido Canal (to the Rincon diversion facility) prior to the lower portion, with a view toward reopening the upper portion at the earliest practicable date and while maintainance services are still being performed upon the lower portion.

The Bands and Interior contend that the La Jolla, Rincon and San Pasqual Indian Reservations were created or acquired for the purpose of providing permanent homes for the members of the respective Bands where they can be economically self-sufficient. Their claim is not disputed and is supported by the record. Insofar as the fulfillment of that purpose requires the availability of water, we find that a license which is conditioned to provide sufficient water for domestic consumption, and to to irrigate crops and water livestock, and to carry on small businesses, will not interfere or be inconsistent with the purpose of providing permanent homes where the members of the respective Bands can become self-sufficient. Article 29 of the license was designed, among other purposes, to preclude such interference or inconsistency; and we find that the license as conditioned will provide sufficient water to fulfill the foregoing purpose of providing permanent homes, rather than to interfere or be inconsistent with it.

Insofar as the Bands' and Interior's exception is bottomed on the Bands' sovereignty over their reservations and their right of self-government,

"Perhaps the most basic principle of all Indian law . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*" (Felix S. Cohen's Handbook Of Federal Indian Law, page 122; emphasis in original.)

Since the limited sovereignty of the La Jolla, Rincon and San Pasqual Bands is of inherent origin, it is obvious that their respective reservations were not created or acquired for the purpose of granting sovereignty and the correlative

right of self-government to them.¹⁴⁰ Accordingly, the Commission is not required to find that the license issued to Mutual, Escondido and Vista will not interfere or be inconsistent with their sovereignty over their reservations and their right of self government.¹⁴¹

¹⁴⁰ Assuming *arguendo* that the respective reservations were created or acquired for the purpose of providing places for the three Bands to exercise their sovereignty and their correlative rights of self-government: The Bands and Interior rely on the words in Section 3 of the Mission Indian Relief Act (and in similar language in the patents implementing the La Jolla, Rincon and San Pasqual Indian Reservations) that the United States will hold the patented land "for the sole use and benefit of the band or village to which it is issued". Those words are similar to the conveyancing words which are generally used in legal documents, as is evidenced by Section 5 of that Act pertaining to allotments to individuals, that the United States

"will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in the case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of such period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

The Bands and Interior contend, "Under Mutual's proposal, the Indian lands would not be used solely to benefit the Indian owners." In effect, such a position precludes the Commission from granting a license to non-Indians without the Bands' and Interior's consent because, as indicated, some physical occupancy of a reservation is unavoidable in the issuance of a license within that reservation. Accordingly, such a position places the Mission Indian Relief Act in direct conflict with the first proviso of Section 4(e) which authorizes the Commission to issue licenses within reservations and directs the Commission, rather than the Bands and/or Interior, to make the interference/inconsistency finding. And, as a result, the Mission Indian Relief Act would be deemed repealed to the extent of such inconsistency, by Section 29 of the Federal Power Act which provides, "That all Acts or parts of Acts inconsistent with this Act are hereby repealed. . . ."

¹⁴¹ "Indian self-government . . . includes the power of an Indian tribe to adopt and operate under a form of government of the Indians choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice." (Felix S. Cohen's Handbook Of Federal Indian Law, page 122.)

Indian self-government therefore pertains to internal matters, as distinguished from external matters which are governed by the Constitution and laws of the United States. In this connection, Congress has given the Commission authority to issue licenses for water power projects which interfere to a limited extent with the *exclusiveness* of the use and

—(*Interior's Conditions*)

The Bands and Interior contend on exception that the Commission is required by the first proviso of Section 4(e) to include the twelve conditions propounded by Interior in any new license issued to Mutual, Escondido and Vista:

"That licenses . . . issued within any reservation . . . shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."
(Emphasis added.)

They assert that the conditions must be reasonable and supported by substantial evidence, and that the test of reasonableness is the statutory standard of whether they are "necessary for the adequate protection and utilization of" the affected reservations. And they add, "If the conditions are reasonable when judged by that standard, they are valid and if the conditions preclude the necessary § 10(a) finding, there will not be a project or the project will be modified."

While the first proviso of Section 4(e) purports on its face to require the inclusion of Interior's proposed conditions in a license issued to Mutual, Escondido and Vista, we believe that the Commission's mandate under Section 10(a) to condition all licenses in such manner "as in the judgment of the Commission will be best adapted to a comprehensive plan" for beneficial public uses, requires the Commission to exercise its judgment in determining the extent to which it will include a Secretary's proposed conditions in a license.

Water power projects commonly necessitate the utilization of national forests, which are forest reservations under the supervision of the Secretary of Agriculture, and/or Indian and other reservations under the supervision of the Secretary of the Interior. Since 1920 those two Secretaries

have been subject to the mandate of the first proviso of Section 4(d) of the Federal Water Power Act (which remains unchanged as the first proviso of Section 4(e) of the Federal Power Act) to propose for inclusion in licenses such conditions as the particular Secretary deems necessary for the adequate protection and utilization of any reservations under that Secretary's supervision which would be utilized by a particular water power project.¹⁴² Also since 1920, the Federal Power Commission (and since 1977 the Federal Energy Regulatory Commission as its successor) has been subject to the mandate of Section 10(a) that the project adopted shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for beneficial public uses.¹⁴³

From 1920 to 1930 the Federal Power Commission consisted of the two Secretaries and the Secretary of War and, as a result, any conflict between the two mandates could be resolved internally within the particular Secretary's office. So long as the two Secretaries were also Federal Power Commissioners they could balance their judgments as Secretaries as to what conditions should be included in particular licenses for the adequate protection and utilization of reservations under their supervision, against their judgments

¹⁴²We agree, in this connection, with the Bands' and Interior's position with respect to the nature of Interior's mandate under the first proviso of Section 4(e). But it is emphasized that the term "deem necessary" therein involves as much an exercise of judgment (although in a particular direction) as the term "judgment" in Section 10(a).

¹⁴³Section 10(a) of the Federal Water Power Act provided, in pertinent part,

"That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the commission will be best adapted to comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses. . . ."

The differences between it and the current Section 10(a) are not material to the issue under consideration.

as Commissioners with respect to the best comprehensive scheme of beneficial public uses. And they could refrain from proposing conditions as Secretaries which they could not accept in their judgments as Commissioners.

In 1930 the Federal Power Commission was reorganized as an independent agency. The first proviso was not changed and, as result, it is inevitable that from time to time the Commission's judgment under Section 10(a) will come into conflict with a Secretary's judgment under the first proviso of Section 4(e). When that occurs, as it does in this proceeding, the Federal Power Act should be construed to accomplish rather than defeat its purpose. As indicated under JURISDICTION — The Present Project No. 176, the principal purpose of the Federal Water Power Act of 1920 was to establish a national policy to promote the comprehensive development of water power, and to administer that policy by abolishing the piecemeal authorities of the Secretaries of the Interior, Agriculture and War over the nation's hydro-electric resources and centralizing them in the Federal Power Commission. To give precedence to a Secretary's judgment over the Commission's judgment would, in our opinion, defeat rather than accomplish that purpose. "It is the *Commission's* judgment on which Congress has placed its reliance for control of licenses." *Federal Power Commission v. Idaho Power Company*, 344 U.S. 17, 20 (1952) (Emphasis added).

In summary, from 1920 to 1930 the decisions of Secretary-Commissioners to condition water power licenses to protect and promote the utilization of reservations were judgmental in their character. But in 1930 the decisions of the Secretaries to so condition water power licenses were cast into an arena of potential conflict with the decisions of independent Federal Power Commissioners to choose the best comprehensive scheme of beneficial public uses. The

legislative history of the 1930 amendment cited by the staff indicates that the potential conflict was understood by the then Secretaries of Agriculture and of the Interior, and that they acknowledged that the independent Commission could not be effective unless it controlled all licensed power sites. We therefore construe that the word "shall" as requiring the Commission to give great weight to the judgments and proposals of the Secretaries of the Interior and Agriculture with respect to conditions to be included in water power licenses, but preserving the Commission's authority to exercise its judgment under Section 10(a) upon the entire record with respect to the extent to which such conditions will in fact be included in particular licenses. 53 FPC 523, 526.

Furthermore, there are reasons for rejecting conditions propounded by the Secretaries other than conflicts between the protection and utilization of reservations, and best adapted comprehensive plans for beneficial public uses. For example, we agree with the sense of Condition 3¹⁴⁴ that Vista should be subject to the Commission's jurisdiction and to the terms and conditions of the license issued herein. But we reject the condition that Vista *agree* thereto since we have found under JURISDICTION — Vista Irrigation District, that Vista is in law subject to the Commission's jurisdiction, and the license is being issued to Vista as a joint licensee.

Interior's proposal is not responsive to the first proviso of Section 4(e) in that Interior states that its proposed conditions are "deemed necessary for the adequate protection and utilization of the La Joila, Rincon, San Pasqual, Pauma, Yuima and Pala Indian Reservations." But consistent with the discussion under First Proviso of Section 4(e) — Inter-

¹⁴⁴"That the Vista Irrigation District agrees to be subject to the terms and conditions of the license and to the jurisdiction and control of the Federal Power Commission."

ference with Reservations, Interior's proposed conditions should be those deemed necessary for the adequate protection and utilization of the La Jolla, Rincon and San Pasqual Indian Reservations only.

Perhaps the most significant reason for rejecting most of the conditions propounded by Interior is the position that they must be included in a license exactly as propounded. If the Commission were required to include those conditions in the license issued herein, it would be unable to exercise its judgment and authority under Section 10(a) to reshape Mutual's and Escondido's joint licensing proposal into the project which is best adapted to a comprehensive plan for beneficial public uses.

Condition 2¹⁴⁵ is rejected in its entirety. The utilization of Vista's lands above Henshaw Dam will be subject to the provisions of the Federal Power Act and the Commission's Rules and Regulations thereunder, as well as the terms of the power license issued herein, to the extent such lands are brought within the ambit of the license. Furthermore, the condition is vague in several particulars (e.g., who is to determine downstream adverse effects, and how consents are to be obtained) and unreasonable in others (e.g., the storage of water above Henshaw Dam adversely affects downstream quantity in view of the evaporation factor and apparently would have to be stopped). And finally, the

¹⁴⁵ "That the Vista Irrigation District will not utilize its lands above Henshaw Dam in any manner that will adversely affect downstream water quality or quantity. Before the Vista Irrigation District initiates any uses of its land above Henshaw Dam that may adversely affect downstream water quality or quantity, it must obtain the written consent and approval of the Federal Power Commission, the Commissioner of the Bureau of Indian Affairs, and the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians. This condition shall not apply to the use of the lands above Henshaw Dam for grazing purposes or to the current recreation lease."

utilization of Vista's lands above Henshaw Dam will not be subject to the Commission's jurisdiction to the extent such lands are not brought within the ambit of the license.

Condition 4¹⁴⁶ is rejected in its entirety because it represents an asserted acknowledgment and quantification of the Bands' claimed water rights under the Winters doctrine and, as indicated, the Bands and Interior expressly "acknowledge that the Commission is without jurisdiction to adjudicate the merits of the existing water rights controversy between the Bands and Mutual and Vista." Condition 4 would therefore require the Commission to do indirectly what they acknowledge cannot be done directly.

Furthermore, Article 29 of the power license issued herein requires Mutual, Escondido and Vista to treat portions of the La Jolla, Rincon and San Pasqual Indian Reservations as a joint service area of Escondido and Vista, and to supply water from the Escondido Canal to that service area in such

¹⁴⁶ "That the Escondido Mutual Water Company and the Vista Irrigation District agree that they shall not infringe upon or interfere in any manner with the right of the Indian reservations to utilize the following annual quantities of water:

	25-year Annual Average	Maximum Annual Diversion
(a) La Jolla	4,990 acre-feet	7,285 acre-feet
(b) Rincon	11,140 acre-feet	16,590 acre-feet
(c) San Pasqual	3,590 acre-feet	5,210 acre-feet
(d) Pauma/Yuima (including Mission Reserve lands)	795 acre-feet	1,190 acre-feet
(e) Pala (including Mission Reserve lands)	21,679 acre-feet	31,880 acre-feet

"That the Escondido Mutual Water Company and the Vista Irrigation District recognize in their operations on the San Luis Rey River watershed that the reserved and other rights of the Indian reservations to the foregoing quantities of water from the San Luis Rey River shall at all times be prior and paramount to any and all rights of the Escondido Mutual Water Company and the Vista Irrigation District to the waters of the San Luis Rey River."

quantities as can be (over time) and are in fact (at a point in time) utilized therein. It is inappropriate under such circumstance to establish any minimum infringement quantities for those areas.

Insofar as the Pala and Pauma Indian Reservations are concerned, the permanent operating plan for Project No. 176 will consider questions pertaining to flows and/or releases to benefit the Pala and Pauma Basins. As is discussed in Footnote 119, their existing and potential water problems are more closely associated with the sharp increase in orchard acreage in the 1950's than with the diversions of the San Luis Rey waters in the 1890's and 1910's.

Furthermore, Condition 4 is impossible of fulfillment because (1) the quantities of water specified therein are the amounts which are claimed to be necessary to irrigate and otherwise utilize the respective reservations, (2) the quantities far exceed the volumes of water which historically have been subject to Mutual's and Vista' control at their respective dams, and (3) any direction of the water one way or the other at Mutual's diversion dam is bound to infringe upon or interfere in some manner with the quantities of water which are made available in the opposite direction.

Condition 5¹⁴⁷ is rejected as being inconsistent with the power license issued herein and the Commission's authority over licensed project works.

¹⁴⁷ "That no water pumped from the Warner groundwater basin shall be transported through Project No. 176 facilities without the prior written agreement of the La Jolla, Rincon, Pala, Pauma, and San Pasqual Bands of Mission Indians, which shall be subject to the approval of the Secretary of the Interior."

We agree with the sense of Condition 6¹⁴⁸ insofar as it is consistent with Article 29 of the power license issued herein requiring water to be supplied to the Indian Service Area. To the extent that irrigation of the Rincon Indian Reservation is thereby increased, the water will percolate into and benefit the Pauma Basin. And to the extent that a permanent operating plan for Project No. 176 will require releases and/or flows to maintain the La Jolla fishery during periods when the Escondido Canal is closed, such releases and/or flows will incidentally benefit the Pauma and possibly the Pala Basins. But insufficient water is available to satisfy all beneficial public uses within the affected area and, as a result, we have decided that the project which is best adapted to

¹⁴⁸ "That the Escondido Mutual Water Company and the Vista Irrigation District acknowledge that the La Jolla, Rincon and San Pasqual Bands of Mission Indians have the right at all times to take from the Escondido Conduit water for agricultural, domestic, recreational or other purposes, or for the purpose of recharging the groundwater basin upon which the Rincon Reservation relies. That the Escondido Mutual Water Company and the Vista Irrigation District will provide water for such purposes at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will release water either at the diversion dam or at the Rincon penstock for the purpose of recharging the Pauma and/or Pala groundwater basin at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will provide such water from any and all sources as constitute a part of the San Luis Rey River system, including storage in Lake Henshaw, in satisfaction of this condition, and that the Indian Bands shall not be limited to the so-called natural flow of the San Luis Rey River. The releases required by this condition include releases from Lake Henshaw to maintain optimum fish flows in the San Luis Rey River above the diversion dam and releases for the maintenance of water quality in the Pala and Pauma groundwater basins. The quantities supplied to the Indian Reservations shall not exceed the quantities specified in Condition No. 4 above except when, in the opinion of the Commissioner of Indian Affairs, larger quantities are required for recharge, water quality, or fishery purposes."

a comprehensive plan for beneficial public uses cannot accommodate releases of water, whether at Henshaw Dam, the diversion dam or the Rincon penstock, solely for the purpose of recharging the Pauma and Pala Basins. Condition 6 is therefore rejected to the extent that it is not consistent with Article 29, and Condition 7¹⁴⁹ is similarly rejected.

Condition 8¹⁵⁰ is rejected as an attempt by Interior to direct the Commission as to the manner of fixing annual charges for the use of tribal lands embraced within Indian reservations, contrary to the first proviso of Section 10(e) of the Federal Power Act.¹⁵¹ That proviso clearly states that the *Commission* shall fix annual charges for the use of dams and other structures owned by the United States, subject to Interior's approval when, and only when, such dams and structures are in reclamation projects. It also states that the *Commission* shall fix annual charges for the use of such

¹⁴⁹“That the Escondido Mutual Water Company and the Vista Irrigation District will make the releases required by Condition No. 6 until a court of competent jurisdiction rules that the releases need not be made.”

¹⁵⁰“That the Escondido Mutual Water Company and the Vista Irrigation District agree to pay to the La Jolla, Rincon, and San Pasqual Bands of Indians such reasonable annual charges as may be fixed by the Federal Power Commission based on the commercial value of the tribal lands involved for the most profitable purposes for which suitable, including water and power development.”

¹⁵¹The first proviso of Section 10(e) states,

“That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing”.

tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in 15 U.S.C. § 476.¹⁵² We interpret the term “fix” in both cases as including authority to determine the manner of fixing annual charges, as well as authority to determine the amount of annual charges. Since Congress gave Interior some authority to approve annual charges and in the same proviso gave only Indian tribes authority to approve annual charges for the use of tribal lands, it appears that Congress intended that annual charges for the use of tribal lands would not be subject to Interior’s approval. Accordingly, we hold that Interior may not pass upon such annual charges by propounding a condition pursuant to the first proviso of Section 4(e) purportedly for the adequate protection and utilization of the reservation.

Interior has indicated that Condition 8 is designed to be consistent with the manner of fixing annual charges which was approved in *Montana II*.¹⁵³ The Federal Power Act, however, is silent as to how annual charges shall be computed, and the United States District Court for the District of Columbia Circuit said in *Montana I*¹⁵⁴ that the only question is “whether the end result is a reasonable one, as the statute requires it to be.” We considered fixing the annual charges herein on the basis of the most profitable use of the tribal lands involved herein, as Interior advocates. But since we are not bound to fix them in any particular manner, and since we are not bound to fix them in the same manner in every case, we have decided that the net benefits method

¹⁵²That the *Commission* has the decisional responsibilities as to both original charges and readjustments, see 445 F.2d, at page 749.

¹⁵³*Montana Power Company v. Federal Power Commission*, 445 F.2d 739 (CA-DC, 1970), cert. denied, 400 U.S. 1013 (1971).

¹⁵⁴*Montana Power Company v. Federal Power Commission*, 298 F.2d 335 (CA-DC, 1962), at page 340.

is more appropriate in this instance. See TERMS OF THE POWER LICENSE — Annual Charges, *infra*.

Condition 10¹⁵⁵ is rejected as being unnecessary with respect to Project No. 176. The right-of-way for the Escondido Canal runs through mountainous terrain on the La Jolla and Rincon Indian Reservations and, therefore, the right-of-way has no other apparent uses on those reservations. The right-of-way for that conduit through the San Pasqual Indian Reservation, on the other hand, can be used for agricultural and other purposes to the extent that it is not physically occupied by project works; but as proposed by Mutual and Escondido, a substantial part of the Escondido Canal will be rerouted from that reservation and the remaining part, running from higher to lower ground, will be fenced for safety reasons.

Condition 10 is accepted in substance, but only in part, with respect to Project No. 559. Insofar as it would permit the utilization of the SDG&E transmission line right-of-way through the Rincon Indian Reservation for agricultural, grazing and possibly other purposes, the condition would appear to be beneficial to the Rincon Band and would also appear not to interfere with the transmission line license issued herein so long as such additional utilization of the right-of-way is kept within reasonable bounds. However,

¹⁵⁵ "That the grant of any right-of-way for Project Nos. 176 and 559 across Indian land shall not preclude agricultural or other use by the Bands of any land included within the rights-of-way that are not actually utilized for the facility itself. Provided, however, that the Bands shall not erect permanent structures or make such other uses of the land which would interfere with or obstruct the licensee's access to project facilities; and further provided that the licensee or licensees agree to hold harmless the Bands, any members of the Band or other agents, employees, lessees, or assigns for any damages, whatsoever, that may be caused by the maintenance or repair of project facilities on Indian lands by the licensee or licensees."

insofar as Condition 10 would hold SDG&E to the standard of an absolute insurer if it is required to enter the right-of-way to maintain or repair its project works, it is inappropriate. Section 10(c) of the Federal Power Act provides, in pertinent part,

"All licenses issued under this Part shall be on the following conditions:

* * *

"(c) That the licensee . . . shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor."

Section 10(c) does not prescribe the standard by which a licensee's liability for damages should be determined, and the Commission's policy has been to permit the standard to be determined by the courts on a decisional basis. Accordingly, we will not undertake to fix a standard and will reject the second proviso of Condition 10.

Condition 11¹⁵⁶ is rejected as being vague, particularly with respect to the phrase "new physical or operational use", and as constituting an unlawful delegation of Commission authority to Interior and the La Jolla, Rincon and San Pasqual Bands. To the extent that the Federal Power Act requires changes in the works and/or operation of Project

¹⁵⁶ "That no new physical or operational use shall be made of the La Jolla, Rincon or San Pasqual Indian Reservations in connection with Project No. 176 operations that has not received the prior written approval of the Band, the Interior Department and the Federal Power Commission."

No. 176 to be approved by the Commission, such changes will be considered and acted upon by the Commission alone. To require all "new physical or operational use" of the three reservations to receive the approval of the Commission, Interior and the three Bands, would preclude the Commission and the licensees from acting alone when they are entitled to act alone and is not necessary to the adequate protection and utilization of the reservations in view of the protection accorded by the Federal Power Act.

And finally, while we accept the sense of Condition 12¹⁵⁷, it is rejected because it does not appear necessary to cover the portion of the Escondido Canal to remain on the San Pasqual Indian Reservation if it is to be fenced as proposed by Mutual and Escondido, and because it is not appropriate to require the destruction of a usable facility if, as suggested in Footnote 84, the San Pasqual Band chooses to utilize 12,000 feet of conduit to be abandoned. If that Band does not want to utilize the conduit to convey water through the eastern portion of the San Pasqual Indian Reservation, then the reservation should be restored by filling the canal and removing the flume structures.

Section 8 of the Mission Indian Relief Act (Article 32)

The Bands and Interior claim on exception that Section 8 of the Mission Indian Relief Act (Footnote 47, *supra*) precludes the issuance of a license to Mutual, Escondido and Vista. Upon analysis, however, their exception reduces itself to the last sentence of that section, which states,

¹⁵⁷"That the licensee shall cover all of the canal conduit remaining above ground on the San Pasqual Reservation with precast concrete sections and shall remove the unused portion of the concrete canal and flume structures no longer in use and shall restore the land."

“Subsequent to the issuance of any tribal patent, or of any individual trust patent . . . any citizen of the United States, firm or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.”

It is important to observe that Section 8 addresses the construction of “appliances for the conveyance of water”, as distinguished from their operation and maintenance, and that its apparent purpose is to assure that the Mission Indians whose reservations are occupied by such appliances would “be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior”. It is important to observe, additionally, that the San Pasqual Indian Reservation was patented *after* the Mission Indian Relief Act was enacted and *after* the Escondido Canal was constructed and placed into operation. Accordingly, there is no Interior or Interior-approved contract assuring the San Pasqual Band of sufficient quantity of water from the Escondido Canal. But the lack of such a contract in our opinion does not give the San Pasqual Band *de facto* veto power over a new license for Project No. 176, particularly when such a license substitutes for such a contract by assuring them of sufficient water and providing a reasonable rental for the use of their reservation.

Insofar as the power and transmission line licenses issued herein authorize the continued operation and maintenance of project works on the La Jolla, Rincon and San Pasqual Indian Reservations, we find that the licenses will not in-

terfere or be inconsistent with the purposes of those reservations insofar as those purposes are implemented by Section 8 of the Mission Indian Relief Act, because the licenses do not authorize activities for which contracts arguably are required by the last sentence of that provision. But insofar as the power license issued herein involves new construction on the San Pasqual Indian Reservation, it may require Mutual¹⁵⁸ to engage in an activity for which a contract to be approved by Interior arguably is required. We believe, however, that since the new construction will occupy a small amount of less-useful acreage of that reservation, and since it will release from servitude a considerably larger amount of more-useful acreage, Section 8 of the Mission Indian Relief Act is not applicable to the construction.¹⁵⁹ And for the same reasons, we find that the power license will not interfere with or be inconsistent with the purposes of that reservation insofar as implemented by Section 8.

Furthermore, in the light of the comprehensive regulatory scheme of the Federal Power Act, we believe that Section 8 is not applicable to appliances for the conveyance of water associated with water power projects. Section 8 does not apply on its face to works (such as dams, reservoirs and powerhouses) which are considerably more major than the appliances (flumes, ditches, canals and pipes) specified therein.

¹⁵⁸It is not necessary to decide whether Escondido and/or Vista are citizens, firms or corporations within the meaning of Section 8; they should become parties to a contract as a practicable matter.

¹⁵⁹While the apparent purpose of Section 8 is to assure that the Mission Indians whose reservations are occupied by appliances for the conveyance of water would be supplied with water from those appliances, the purpose of the instant construction is to remove such an appliance from a reservation. Section 8 would, therefore, appear not to be applicable to such construction since the apparent purpose of that provision could not be carried out.

Assuming *arguendo* that a contract is required by the last sentence of Section 8 of the Mission Indian Relief Act, such a contract is not essential to the power license issued herein. The record indicates that the Escondido Canal can be rerouted (1) around the northwest corner of the eastern portion of the San Pasqual Indian Reservation by constructing an inverted siphon, similar to Hellhole Siphon, across Paradise Creek Canyon, and (2) around the southern portion of that reservation, at a total cost of about \$1,000,000 more than the new construction proposed by Mutual and Escondido. Mutual, Escondido and Vista naturally will have to decide whether the cost is economically justifiable in the light of the other construction costs they will incur, particularly in conjunction with Henshaw Dam and the Warner Ranch well field. Alternatively, Mutual, Escondido and Vista could reroute the Escondido Canal from a point after it leaves the San Pasqual Indian Reservation (and before re-entering), thereby avoiding in another way any new construction on that reservation.

In order to avoid any question of whether a contract is required by Section 8, Article 32 of the power license issued herein requires Mutual, Escondido and Vista to use their best efforts to negotiate a reasonable contract with the San Pasqual Band and to obtain Interior's approval. If the Escondido Canal is rerouted around the San Pasqual Indian Reservation, the San Pasqual Band naturally will not be entitled to receive water from that conduit or annual charges as provided in the license.

Section 16 of the Indian Reorganization Act (Article 32)

The Bands and Interior also claim on exception that Section 16 of the Indian Reorganization Act (25 U.S.C. § 476) precludes the issuance of a license to Mutual, Escondido

and Vista, without the consent of the San Pasqual Band.¹⁶⁰ Section 16 authorizes Indians to organize for their common welfare and to adopt a constitution and bylaws to be approved by Interior, and then provides, in pertinent part,

"In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To . . . prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. . . ."

The San Pasqual Band so organized itself and adopted a constitution which was approved by Interior on January 4, 1971, and which provides in Article VIII:

"*Section 1. The general council shall have the powers and responsibilities hereafter provided, subject to any limitation imposed by the statutes or the Constitution of the United States.*

* * *

"(c) To veto any sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other assets of the band made by any authority other than the general council."

The Bands and Interior assert, in this connection, that the Federal Power Act

"plainly *authorizes* the Commission to grant . . . rights of way and other Interests in Indian Tribal lands, but it is not automatic; it is subject to the qualifications and standards of the Federal Power Act, particularly Sections 4(e) and 10(e), as well as other laws, including treaties, defining the purposes of Indian reservations and the rights of Indian tribes." (Footnote omitted.)

¹⁶⁰The La Jolla and Rincon Bands are not organized under the Indian Reorganization Act.

While they cite legislative history, early interpretations by Interior and court decisions to indicate that the purpose of Section 16 was to give Indians control of their own affairs and property, we are apprehensive that the constitution of the San Pasqual Band falls short of that goal insofar as it subjects the general council's veto authority¹⁶¹ to the limitations imposed by the statutes of the United States, including the Federal Power Act.

Furthermore, we do not believe that Congress, on June 18, 1934, extended a veto power to organized Indians with respect to the occupation of their reservation lands by licensed project works, and then repealed that veto power on August 26, 1935, by re-enacting the first proviso of Section 4(d) of the Federal Water Power Act without change as the first proviso of Section 4(e) of the Federal Power Act, and thereby renewing the Commission's authority to issue licenses within Indian reservations after finding that the licenses will not interfere or be inconsistent with the purposes for which the reservations were created or acquired.¹⁶² We believe, instead, that such a veto power never came into existence. As is discussed in the following section of this Opinion and order, Congress changed Section 10(e) to extend certain authority to Indians with respect to annual charges, but Congress did not change the first proviso of

¹⁶¹Without deciding, it is assumed the right-of-way through the San Pasqual Indian Reservation incident to the power license issued herein would be a "disposition, lease, or encumbrance of tribal lands [or] interests in lands" within the purview of Section 16.

¹⁶²In *Winters, supra*, it was argued that the admission of Montana into the Union "upon an equal footing with the original States" pursuant to the Act of February 22, 1889, repealed the agreement of May 1, 1888, creating the Fort Belknap Reservation and reserving waters of the Milk River for the Indians. The Supreme Court said, 207 U.S., at 577, that "it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste".

Section 4(e) which was the logical place to qualify the Commission's licensing jurisdiction. Accordingly, we conclude that Congress did not in 1934 qualify the Commission's licensing jurisdiction enacted in 1920 with respect to Indian reservations.

In any event, and in the light of the facts and issues in this proceeding, there is no substantive difference between a requirement under Section 8 of the Mission Indian Relief Act that Mutual enter into a contract with the San Pasqual Band to authorize the construction of a new section of conduit, and a requirement under Section 16 of the Indian Reorganization Act that Mutual, Escondido and Vista obtain the consent of the San Pasqual Band to utilize a right-of-way through its reservation. Therefore, having decided to avoid any question of whether a contract is required by Section 8 of the Mission Indian Relief Act, we choose to avoid any question of whether such consent is required by Section 16 of the Indian Reorganization Act, for it is not essential to the power license issued herein. Article 32 of the power license issued herein requires Mutual, Escondido and Vista to use their best efforts to negotiate a reasonable contract covering Sections 8 and 16 of the two statutes.¹⁶³

Section 10(e)

Finally, the Bands and Interior claim on exception that the first proviso of Section 10(e) of the Federal Power Act (Footnote 151, *supra*), "requires the Bands' and Interior's

¹⁶³Since the Escondido Canal can be routed around the San Pasqual Indian Reservation, although at a cost, a direct conflict between the Federal Power Act and Section 8 of the Mission Indian Relief Act and/or Section 16 of the Indian Reorganization Act can be avoided. Accordingly, we will not decide whether those provisions are repealed by Section 29 of the Federal Power Act other than to the extent discussed in Footnote 140 under First Proviso of Section 4(e) — (Interference with Reservations).

approval before their lands can be included in a new license to Mutual." They say, in this connection, "that the Indian tribe's approval of annual charges is prerequisite to the issuance of a license involving Indian lands." We disagree.

As indicated in the discussion of Condition 8, *supra*, the first proviso of Section 10(e) does not require Interior's approval of annual charges for the use of tribal lands embraced within Indian reservations. It is true that the United States Court of Appeals for the District of Columbia Circuit said in *Montana I*¹⁶⁴ that Interior had a "veto power", as the Bands and Interior point out. But that "veto power" was not based on the first proviso of Section 10(e). It was based upon the Act of March 7, 1928,¹⁶⁵ which authorized the Commission to issue a license within the Flathead Reservation "upon terms satisfactory to the Secretary of the Interior". Interior thus had express authority under that statute to disapprove annual charges, among other terms, which were not considered "satisfactory". The District of Columbia Circuit said with respect to that "veto power" in *Montana II*, 445 F.2d, at page 756,

"... Before this court the Secretary had disclaimed any right to disapprove the ruling of this court.

"In our view this disclaimer is only what the law requires. The Secretary will be bound whether we affirm the Commission's ruling on the merits, or hold in favor of the Company's contention on the merits, in whole or in part."

¹⁶⁴298 F.2d, Footnote 2 at page 338.

¹⁶⁵445 F.2d, Footnote 3 at page 742.

And the District of Columbia Circuit added in Montana III¹⁶⁶, 459 F.2d, at page 874,

"The Secretary is a public figure who could not insist on withholding approval unless the rental rate to be paid were unreasonable. Considering the applicable statutes together he may approve a rental offered by the Company, and he may negotiate for an approved consensual arrangement; but if there is no agreement and the matter goes to the Commission, the Secretary can refuse to approve the rate fixed by the Commission only by seeking court review of its determination. *As is the situation with the Tribes, the Secretary can participate as a party and avail of the provisions for judicial review.*" (Emphasis added.)

The first proviso of Section 10(e) said in 1920,

"That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may

¹⁶⁶Montana Power Company v. Federal Power Commission, 459 F.2d 863 (CA-DC, 1972), cert. denied, 408 U.S. 930 (1972).

The statement in Montana I, 298 F.2d, at page 340,

"The annual charges shall be reasonable, Section 10(e) says, and must be approved by the Secretary of the Interior and the Indians themselves; otherwise, the statute is silent as to how Indian rentals shall be computed,"

and the reference in Montana II, 445 F.2d, at page 756, to "the approval of the Secretary and of the Indian Tribes referred to in § 10(e) of the Act," are both consistent with our position herein that under Section 10(e) Interior approves annual charges for the use of dams and other structures in reclamation projects and Indians approve annual charges for the use of tribal lands embraced within Indian reservations. The further statement in Montana II, 445 F.2d, at page 756, that approval "is manifested initially by the concurrence with the licensee which must exist in order for the application for the original license . . . to be approved by the Commission," is dictum in view of the fact that a licensing application was not then before the District of Columbia Circuit and, in any event, is superseded by the quotation from Montana III.

be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license”.

While Congress amended that proviso in 1935 to direct the Commission to fix annual charges for the use of tribal lands embraced within Indian reservations “subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934”, the legislative history of that amendment indicates that Congress did not address the consequences of an Indian tribe’s withholding such approval. Indeed, the language requiring such approval was not contained in either the House or Senate bill, but was introduced as a floor amendment during the Senate debate on June 11, 1935, at which time there was no discussion of the merits of the amendment. 89 Cong. Rec. 9054. Thereafter the language appeared in the Conference Report (74th Congress, 1st Session, House of Representatives, Report No. 1903) with the following explanation:

“[T]he Senate bill requires approval of the Secretary of the Interior *or* of the appropriate Indian tribe in fixing annual charges for the use of public lands *or* lands within an Indian reservation. The House amendment did not carry this provision, but it has been incorporated in the conference substitute.” (Emphasis added.)

As did the District of Columbia Circuit in *Montana II*, 445 F.2d, at page 746, we must discern the applicable legislative intent by what is necessarily an act of projection. In this instance, however, the explanations of the changes to Section 10(e) in the House and Senate Reports are not germane because the language requiring approval was not then in the respective bills.

The Bands and Interior claim, in this connection, that the 1935 amendment to the first proviso of Section 10(e) assured that Indians could exercise their newly enacted Indian Reorganization Act powers over Commission-licensed project works, including the power in Section 16 of that Act "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe". Assuming *arguendo* and contrary to our view that they are correct, then only the San Pasqual Band would have that right because Section 18 of the Indian Reorganization Act (25 U.S.C. § 478) provides that it shall not apply to any reservation wherein a majority of the adult Indians shall have voted against its application, and the La Jolla and Rincon Bands so voted.

We think that the better view is that if in 1935 Congress wanted to qualify the Commission's licensing jurisdiction with respect to tribal lands embraced within Indian reservations, logically it should have amended the first proviso of Section 4(d) of the Federal Water Power Act which clearly gave the Commission authority to issue a license "within any reservation".¹⁶⁷ As indicated, however, that proviso was reenacted without change in 1935 as the first proviso of Section 4(e) of the Federal Power Act. Certainly, if Congress wanted to qualify that authority, it would have included appropriate language in the first proviso of Section 4(e) pertaining to the Commission's licensing authority, rather than the first proviso of Section 10(e) pertaining to annual charges. In the absence of a clear indication from Congress that it was extending veto power to Indians over

¹⁶⁷The authority was and still is subject to a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired.

Commission-licensed project works¹⁶⁸, and in the absence of a clear indication of the standard by which such power would be exercised¹⁶⁹, we will not construe the first proviso of Section 10(e) as conferring such a power on Indians.

We conclude that the 1935 amendment to the first proviso of Section 10(e) confers an unqualified right upon Indians to participate in fixing annual charges for the use of their reservations, whether by negotiation, participation in an administrative proceeding or participation in judicial review.

The Bands and Interior argue on exception that under such a construction "any and all conceivable meaning would

¹⁶⁸ "The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principals: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe. . . . (3) These powers are subject to qualification by treaties and by express legislation of Congress. . . ." Felix S. Cohen's Handbook of Federal Indian Law, page 123.

The Supreme Court in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), and again in *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), held that a State could not in effect veto a license issued under the Federal Power Act. Since States have always been considered to possess all of their sovereign powers (including their powers over external affairs) which have not been delegated to the United States, and since Indian tribes have been treated as conquered nations without powers over their external affairs, it is inappropriate in the absence of express legislation by Congress to attribute a veto power to a sovereignty without external powers when the same veto power has been denied to sovereignties with reserved external powers.

¹⁶⁹ Assuming *arguendo* and contrary to our view that Congress extended veto power to Indians with respect to licenses issued under the Federal Power Act, such power would likely be viewed by a court as an unconstitutional delegation of authority since there is no express standard by which it would be exercised. If, on the other hand, the standard of reasonableness applicable to the Commission is construed as being applicable to such veto power, then such power would entitle Indians merely to participate as parties and avail of the provisions for judicial review, as indicated by the District of Columbia Circuit in *Montana Ill.*, 459 F.2d, at page 874.

vanish from the 1935 amendment requiring the tribes' approval," for it gives them nothing to which they are not entitled under Sections 306, 308(a) and 313 of the Federal Power Act. Such an argument, however, reflects a new generation taking for granted a statutory right which they have always known. The Bands are litigating the validity of certain pre-Indian Reorganization Act contracts which were entered into by Interior on their behalf. The Act of June 18, 1934 — the Indian Reorganization Act — was the most comprehensive piece of Indian legislation in 100 years and, as noted, it conferred certain powers upon Indian tribes relative to their external affairs. After adopting a constitution approved by their guardian, Interior, an Indian tribe (the ward) could exercise the powers over its external affairs which were conferred by Section 16 of that Act and its Constitution.

Congress conferred an additional power over external affairs a year later in the 1935 amendment to the first proviso of Section 10(e). The amendment gave Indians, as distinguished from their guardian, a right to participate in fixing annual charges for the use of their reservations, including an unqualified right to negotiate contracts pertaining to annual charges and a qualified right to consummate such contracts. So long as the Commission would be satisfied as to the reasonableness of the annual charges negotiated by Indians, it could fix such charges with their approval. While the present generation of Indians may take for granted the right to act on their own behalf with respect to annual charges, the fact is that the right was conferred by statute in the mid-1930's and the Bands are now engaged in litigation because they are not satisfied with contracts entered into on their behalf prior to that time.¹⁷⁰

¹⁷⁰Furthermore, the 1935 amendment to the first proviso of Section 10(e) should be viewed as cumulative of the rights conferred in the same legislation by Sections 306, 308(a) and 313.

With respect to the further question of which Bands are conferred authority to participate in fixing annual charges, we are persuaded that the reference to "the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934," is descriptive of those who may so act. As the Bands and Interior indicate, Section 16 of the Indian Reorganization Act begins,

"Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare. . . ."¹⁷¹

That concept — Indians residing on the same reservation — was carried over into the first proviso of Section 10(e) to describe those who would have authority to approve annual charges for the use of their reservations. As the Bands and Interior indicate, the Rincon Band was the appropriate entity to vote upon organization of the Rincon Indian Reservation even though it is part of the San Luiseno Tribe and, therefore, it is also the appropriate entity to have authority with respect to annual charges for the use of that reservation. Accordingly, we conclude that even though the La Jolla and Rincon Bands are not organized under the Indian Reorganization Act and, therefore, that Act as such is not applicable to the La Jolla and Rincon Indian Reservations, nonetheless, the La Jolla, Rincon and San Pasqual Bands have authority under the first proviso of Section 10(e) of the Federal Power Act to approve annual charges for the use of their respective reservations.

TERMS OF THE POWER LICENSE

Thirty Year Term

When a new license is issued pursuant to Section 15(a) of the Federal Power Act and there is no new investment in the licensed project works, it is the policy of the Com-

¹⁷¹Section 19 of the Indian Reorganization Act defines the term "tribe" as referring to "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."

mission to issue the license for a thirty-year term absent unusual circumstances or certain exceptions, rather than for the maximum fifty-year term authorized by Section 6.¹⁷² Substantial new investment, on the other hand, is an exception which has been held to justify a longer relicensing term.¹⁷³

While the power license issued herein contemplates the construction of 8,550 feet of 48-inch pipeline as proposed by the joint application amendment filed January 12, 1976, and the abandonment of approximately 12,000 feet of conduit on the eastern portion of the San Pasqual Indian Reservation, Mutual, Escondido and Vista may find it necessary to go to the added expense of by-passing that reservation entirely. Furthermore, additional investment will be required in the vicinity of Lake Henshaw to bring Henshaw Dam up to current safety standards and to assure a continued supply of pumped water from the Warner Basin.

Project No. 176 will therefore require some new investment, but the aggregate amount cannot reasonably be ascertained at this time. Under such circumstances, and in the light of the policy enunciated in *The Montana Power Company, supra*, we find it appropriate to issue a new power license effective as of the first day of the month in which this Opinion and order is issued, and terminating not sooner than June 24, 2004, which is thirty years from the expiration date of the initial license. Our action fixing the term at thirty years should not be construed as precluding an extension of that term is if such an extension is justified by future circumstances. That concept — Indians residing on the same

¹⁷²Order issued October 5, 1976, in *The Montana Power Company*, Project No. 2301, 56 FFC

¹⁷³*South Carolina Electric & Gas Co.*, Project No. 1894, 52 FPC 537 (1974).

reservation — was carried over into the first proviso of Section 10(e) to describe those who would have authority to approve annual charges for the use of their reservations. As the Bands and Interior indicate, the Rincon Band was the appropriate entity to vote upon organization of the Rincon Indian Reservation even though it is part of the San Luiseno Tribe and, therefore, it is also the appropriate entity to have authority with respect to annual charges for the use of that reservation. Accordingly, we conclude that even though the La Jolla and Rincon Bands are not organized under the Indian Reorganization Act and, therefore, that that Act as such is not applicable to the La Jolla and Rincon Indian Reservations, nonetheless, the La Jolla, Rincon and San Pasqual Bands have authority under the first proviso of Section 10(e) of the Federal Power Act to approve annual charges for the use of their respective reservations.

License to be Amended (Article 27)

Article 27 embodies the substance of Interior's Condition 1¹⁷⁴ to reflect the inclusion of Henshaw Dam and Lake Henshaw within the ambit of the power license issued herein, together with the lands and other facilities, including the pumping facilities, which are associated with their operation and maintenance and the water rights which are incident thereto. See JURISDICTION — The Henshaw Facilities and Water Rights.

The California Department of Water Resources, Division of Safety of Dams, requires Lake Henshaw to be restricted

¹⁷⁴ "That Henshaw Dam and Lake Henshaw, together with all wells, pumps, and other physical facilities belonging to the Escondido Mutual Water Company and/or the Vista Irrigation District which are or may be utilized to draw water from the Warner groundwater basin, be included as part of the project works in any new license for Project No. 176 to the Escondido Mutual Water Company, the City of Escondido, and/or the Vista Irrigation District."

to 10,000 acre-feet until appropriate modifications are made to comply with current safety standards. Because that restriction impairs the water storage value of Lake Henshaw, and because Vista has proposed certain modifications to eliminate that restriction, Article 27 provides for consideration of Vista's and other possible proposals to cause Henshaw Dam and its associated facilities to be structurally sound, safe and adequate.

Similarly, Vista has proposed alternative plans for modifying the facilities and operations for pumping groundwater from the Warner Basin.¹⁷⁵ Article 27 provides for consideration of Vista's and other possible proposals and, to the extent found appropriate, for fixing the amount of groundwater which may be extracted from that basin. It provides, additionally, for the development of a permanent operating plan for the Warner Basin and for authorization of such facilities as may be appropriate to implement that plan. But, as is discussed under COMPLIANCE ISSUES — Cease and Desist Order, *infra*, replacements of deteriorating facilities are not precluded pending Commission approval of a permanent operating plan.

Article 27 provides, additionally, for consideration of a permanent water operating plan for Project No. 176 under which the comprehensive plan adopted herein will be refined to maximize its benefits and minimize its liabilities. Since

¹⁷⁵Although Warner Basin clearly is licensable as a subsurface "reservoir" as that term is used in the definition of "project" in Section 3(11) of the Federal Power Act, we believe that we can discharge our regulatory responsibilities if the licensed project works associated with the pumping activity include the pumping facilities, the pipelines and ditches connecting such facilities with Lake Henshaw and the narrow strips of land on which such facilities, pipelines and ditches are situated. If, on the other hand, water is injected into Warner Basin for storage, we would give further consideration to what additional lands and facilities, if any, would have to be brought within the ambit of the license to enable us to discharge our regulatory responsibilities.

Lake Henshaw is the only headwater impoundment of the project and has not been licensed previously, multi-year and annual operating regimes for Lake Henshaw and Henshaw Dam must be developed, presumably in conjunction with a permanent operating plan for the Warner Basin, for regulating the storage and release of water within different time frames and in the light of changing conditions of precipitation.

Consideration should be given to providing year-round fishery benefits on the San Luis Rey River between Henshaw Dam and the diversion dam by releasing water primarily for that purpose¹⁷⁶ during periods when the Escondido Canal is closed for maintenance and repair, which ordinarily occurs during September, October and November. The issues should focus on how much water will be required to maintain the necessary continuity of flow, and whether the benefits to be derived will outweigh or be outweighed by other beneficial public uses of the same quantity of water. Consideration should also be given to maximizing the fishery benefits throughout the year (whether for 9 or 12 months) by operating Henshaw Dam in such a manner as to minimize hourly and/or daily fluctuations and produce as constant a flow as is feasible consistent with other beneficial public uses of the water.

Although the amount of power generated by Project No. 176 could be increased by more than 1,000,000 kilowatt-hours a year by operating the project for that purpose, it is primarily a water supply project and we do not propose to

¹⁷⁶Releases of water to maintain a fishery when the Escondido Canal is closed would incidentally benefit the Pauma and Pala Basins. If the Escondido Canal is opened to the Rincon diversion facility while maintenance and repairs proceed on its lower reaches, fishery releases can be routed through the Rincon powerhouse to generate power while still benefiting the Pauma and Pala Basins.

cause it to be operated otherwise. Nonetheless, if the amount of electricity generated can be increased consistent with the operation of the project for water supply, appropriate measures should be taken. For example, if two cfs of water are to by-pass the Rincon powerhouse for irrigation purposes for a given period of time, consideration should be given to whether the same or equivalent irrigation results can be achieved by passing three cfs of water *through* the Rincon powerhouse for a shorter period of time.¹⁷⁷ As part of a permanent water operating plan, Article 27 contemplates the possible construction or installation of relatively minor facilities, to the extent feasible, for modifying flows through the powerhouse for the purpose of enhancing the generation of electric power consistent with other beneficial public uses of the water.

Licensees to Provide Water (Article 29)

Article 29 is designed to preclude any possible interference or inconsistency of the power license issued herein with the purpose for which the La Jolla, Rincon and San Pasqual Indian Reservations were created, in the light of the claim, as noted, that "Any water that Mutual is licensed to take through Indian lands that could otherwise be utilized by the Bands necessarily interferes with the utilization of the reservation by the Indians."

—(Authority)

In the Commission's judgment under Section 10(a) of the Federal Power Act, as already discussed, the project which is best adapted to a comprehensive plan for beneficial public uses will be secured, not by the issuance of a license to the

¹⁷⁷ Perhaps a small amount of pondage, less than the storage proposed by the Bands for Paradise Creek, would provide an economic aid for modifying the flows.

Bands or by takeover by the United States, nor by the issuance of the power license proposed by Mutual and Escondido, but by the issuance to Mutual, Escondido and Vista of a modified version of that power license. Article 29 is bottomed principally on the Commission's authority under Section 10(a) "to require the modification of any project" if the modification is necessary to secure the project which in the Commission's judgment is best adapted to a comprehensive plan for beneficial public uses.

Having decided that none of the proposals, as made, will secure a suitable comprehensive plan, we read Section 10(a) as directing the Commission to condition the best adaptable of them, which, in this case, is the power license proposed by Mutual and Escondido, in any reasonable manner deemed necessary by the Commission to enable it to make the finding under Section 4(e), among others, that the power license issued herein will not interfere or be inconsistent with the purpose for which the La Jolla, Rincon and San Pasqual Indian Reservations were created.

The Commission has authority under Section 10(a) to require the modification of any "project", and the term "project" is defined under Section 3(11) as including all water rights, the use of which are necessary or appropriate in the operation of the complete unit of development which is the "project". Accordingly, we conclude that the Commission has authority under Section 10(a) to require the modification of water rights incident to a project if such modification is necessary to enable the Commission to make a finding under Section 4(e) that a license will not interfere or be inconsistent with the purpose for which a reservation was created or acquired.

Section 10(a) is precisely the type of specific congressional directive to which the Supreme Court was referring in *California v. United States, supra*, (Slip Opinion, at page 22, footnote),

“In previous cases interpreting § 8 of the 1902 Reclamation Act, however, this Court has held that state water law does not control in the distribution of reclamation water *if* inconsistent with other congressional directives to the Secretary. See *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958); *City of Fresno v. California*, 372 U.S. 627 (1963). We believe this reading of the Act is also consistent with the legislative history and indeed is the preferable reading of the Act. See *infra*, n. 25.”

and (Slip Opinion, at page 26, footnote),

“ . . . See n. 19, *supra*. *Ivanhoe* and *City of Fresno* read the legislative history of the 1902 Act as evidencing Congress’ intent that specific congressional directives which were contrary to state law regulating distribution of water would override that law. Even were this aspect of *Ivanhoe res nova*, we believe it to be the preferable reading of the Act.”

Furthermore, the Supreme Court in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, *supra*, indicated, 328 U.S., beginning at page 167, that the Commission’s actions under Section 10(a) would supersede State law. See Footnote 98, *supra*. In *Portland General Electric Co. v. Federal Power Commission*, *supra*, the United States Court of Appeals for the Ninth Circuit held that Section 27 does not preclude the Commission from imposing conditions pursuant to its power specifically vested by Section 11. See Footnote 95, *supra*. And in *State of California v. Federal Power Commission*, 345 F.2d 917 (CA9, 1965), cert. denied, 382 U.S. 941, the same court held, 345 F.2d, at pages 923-4, that Section 27 does not preclude the Commission from attaching conditions to a license pursuant to Section 10(a) which may impair the use of irrigation water rights.

Article 29 is bottomed, additionally, on Section 10(g) and the National Environmental Policy Act of 1969. See LICENSING ISSUES — Socio-Economic Issue. As discussed herein, it is the vehicle through which the Commission is able to find under the first proviso of Section 4(e) that the license will not interfere or be inconsistent with the purpose of the reservations and, consequently it is the price in water of the power license issued herein.

—(*Interference/Inconsistency*)

The La Jolla, Rincon and San Pasqual Indian Reservations were created for the purpose of providing permanent homes for the members of those respective Bands where they can be economically self-sufficient. The concept of economic self-sufficiency requires that the three reservations have adequate supplies of water for domestic, agricultural, stock-watering and small commercial consumption by the members of those Bands who choose to earn their livings on reservation lands. The first proviso of Section 4(e) does not require that adequate supplies of water be furnished to the three reservations if such supplies do not otherwise exist. It requires only that the power license issued herein may not interfere or be inconsistent with those supplies.¹⁷⁸

Insofar as the Henshaw facilities impound the natural flow of San Luis Rey tributaries, the resulting evaporation of the impounded waters reduces the overall flow of the river through the La Jolla and Rincon Indian Reservations. But that evaporation loss is offset by the waters which are pumped from the Warner Basin. And Henshaw Dam makes it pos-

¹⁷⁸As a practicable matter interference and/or inconsistency may be more arguable than real, or, if real, may not be susceptible of quantification, as is the case herein. As a result, the practicable way to avoid such interference and/or inconsistency is to furnish sufficient water to offset possible adverse effects of a project on existing water supplies.

sible to store San Luis Rey water from wet to dry seasons and, within limits, from wet to dry years. On balance, operation of the Henshaw facilities results in no net loss of the overall flow of the river through the La Jolla and Rincon Indian Reservations. Operation of the Henshaw facilities produces a sufficiently regular flow of the river to permit it to be stocked annually for fishing, including the La Jolla Indian Reservation from the eastern boundary to the diversion facilities. And operation of the Henshaw facilities does not impair or interfere with the water supply of that reservation from the eastern boundary to the diversion facilities.

The diversion facilities obviously reduce the flow of the San Luis Rey River through the southwestern portion of the La Jolla Indian Reservation. That area is mountainous and away from the population center of the reservation which, historically, has never been irrigated with San Luis Rey water. Although that area was not considered irrigable in 1924, the local technology of citrus and avocado orchards now appears to favor sloping rather than flat terrain and, as a result, the southwestern portion of the La Jolla Indian Reservation is claimed to be irrigable for those long term crops. Irrigation of those crops from the San Luis Rey River, however, would require considerable investment in pumping and other facilities to raise the water several hundred feet, and would be non-existent or of inadequate regularity during the summer under conditions of both natural flow and the Henshaw-controlled flow as reduced by the diversion facilities. As a result, the impairment or interference with the La Jolla water supply resulting from operation of the diversion facilities appears to be more speculative than real. Nonetheless, there is arguably some impairment. But that impairment can be offset with regular gravity flows from the Escondido Canal in view of the elevation and location of that waterway.

The San Pasqual Indian Reservation is partly outside the San Luis Rey watershed and would not have San Luis Rey water available to its members in the absence of the Escondido Canal. It obtains water for domestic purposes from Valley Center Municipal Water District and from private wells. As a result, it is difficult to comprehend how a license to operate and maintain Project No. 176 would interfere or be inconsistent with that reservation's water supply.

The Rincon Indian Reservation, on the other hand, is the subject of a classic case of impairment in the absence of a protective condition, such as Article 29. Historically, the members of the Rincon Band were farmers and irrigated their reservation by means of ditches from the San Luis Rey River. In 1892 the Rincon Band appropriated 2,000 miners inches¹⁷⁹ from the river "to be used on the Rincon Indian Reservation and adjacent country for irrigation Mechanical and domestic purposes."¹⁸⁰ In 1894 Escondido Irrigation District agreed to furnish an "ample supply and quantity of water" to the Rincon Band, free, "so long as the Indians shall reside upon the said reservations. . . ."¹⁸¹

In 1914 the foregoing "ample supply and quantity of water" was quantified as to flow¹⁸² when Mutual agreed that the Rincon Band was entitled to "a minimum flow of six cubic feet of water per second of time . . . and, in extremely dry years, a minimum flow of three cubic feet of water per second of time for the months of July, August,

¹⁷⁹The Rincon Band's appropriation is 1/50 of the aggregate amount of Mutual's predecessor's appropriations, or 82.86 acre-feet per year based upon the 1912 quantification of Mutual's predecessor's appropriations.

¹⁸⁰The quotation may not be precise since it is taken from an exhibit which is a reproduction of a handwritten document.

¹⁸¹The agreement was also applicable to the La Jolla Band.

¹⁸²The Rincon Band's entitlement was not quantified as to annual volume, as was Mutual's entitlement in 1912.

and September of each such extremely dry year." In 1922 Henshaw acknowledged the Rincon Band's right to the first six second feet of natural flow. But later that year his successor, San Diego County Water Company, agreed to maintain a continuous flow of 6 cfs at Mutual's intake from January through June, and caused Mutual to agree to deliver from July through December the amounts which had been quantified in 1914.

The latter agreement, dated November 10, 1922, was a milestone in the impairment of the Rincon Band's "ample supply and quantity of water," for it operated without the participation of the Rincon Band as a settlement of the benefits which would result from the construction and operation of the Henshaw facilities. As part of that settlement Mutual agreed to extend the conveyance benefits of the Escondido Canal to the San Diego County Water Company in consideration for a sale to Mutual of stored water for summer delivery. While Mutual thereby acquired summer water for itself, it agreed to satisfy the Rincon Band's entitlement from its (Mutual's) natural flow water principally during periods in which there is little or no natural flow, or in which the Escondido Canal is closed for maintenance and repairs. Although the Rincon Band appropriated San Luis Rey water two decades before Henshaw, the Band was effectively denied any storage benefits in Lake Henshaw.¹⁸³

In 1915, about a year after the Rincon Band's entitlement was quantified as to flow, a measuring device was installed near the intake of the Escondido Canal; but that device was washed away by a record flood in 1916 and was never

¹⁸³In retrospect, it is easy to see that the Henshaw facilities should have been licensed under the Federal Power Act and that the license should have required the storage benefits of the impoundment to be extended to all prior appropriators of San Luis Rey waters.

replaced. As a result, the natural flow of the San Luis Rey River at the intake was never measured, and the construction of Henshaw Dam in 1922, nine miles upstream, precluded the natural flow from ever being measured. Thereafter, substitute measurements were taken during periods of low flow on the West Fork of the San Luis Rey River at or about the point where it enters Lake Henshaw.¹⁸⁴

The stage was thereby set for the final impairment of the Rincon Band's "ample supply and quantity of water." Pumping of the Warner Basin was begun in 1950 and adversely affected the level of the groundwater where the West Ford of the San Luis Rey River enters Lake Henshaw. As a result, some of the surface flow percolated into the basin, reducing the surface flow for delivery to the Rincon Band. That situation persisted until the so-called Powell Formula was developed during the course of this proceeding to make adjustments for the Rincon Band's entitlements.

In view of the physical changes to the San Luis Rey basin, it is not possible to measure the natural water supply of the Rincon Indian Reservation. And because that supply cannot be measured, there is no standard by which to judge possible impairment or interference by a power license such as the one issued herein, but without a protective condition. Insofar as the natural water supply consisted of diversions from the San Luis Rey River, that supply was insufficient and of inadequate regularity in the summer to irrigate 2,000 acres of the Rincon Indian Reservation, as is proposed under the Bands' plan for a nonpower license. The diversion facilities

¹⁸⁴Such measurements would have to be adjusted for the evaporation factor of Lake Henshaw and for unmeasured inflows between Henshaw Dam and the diversion dam. Furthermore, the agreement of November 10, 1922, requires measurements on all tributaries of the San Luis Rey River, not just the West Fork. Accordingly, the total flow into Lake Henshaw was never measured.

reduce the flow of the San Luis Rey River through the Rincon Indian Reservation and thus deprive that reservation of surface flows under both natural and Henshaw-controlled conditions,¹⁸⁵ as well as groundwater resulting from the percolation of surface flows. Of course, some of the diversions through the Escondido Canal are earmarked for delivery to the Rincon Indian Reservation through the Rincon penstock. Although those deliveries are now measured under the Powell Formula, that formula was devised to make adjustments for the Rincon Band's entitlement as quantified in part in 1914 and embodied into Mutual's 1924 license. Assuming that that entitlement was adequate in 1914, it will become inadequate if the members of the Rincon Band can demonstrate that they can bring 2,000 acres of their reservation under irrigation in 25 years, requiring a peak demand of 17 cfs, as they claim in this proceeding.

Although we are unable to quantify the extent to which a new power license would interfere or be inconsistent with the water supply of the Rincon Indian Reservation, we find on balance, and particularly in the light of the erosion of the Rincon Band's "ample supply and quantity of water" prior to and during the term of Mutual's 1924 license, that interference or inconsistency is unavoidable unless a new license is conditioned to preclude such a result. Whether or not 2,000 miners inches was adequate in 1894, or 6 cfs was adequate in 1914, the fact is that Project No. 176 reduces the surface and subsurface flows of the Rincon Indian Reservation. The practicable solution to that unquantifiable interference or inconsistency is to provide that reservation with

¹⁸⁵The deprivation of surface flows has a beneficial effect insofar as the La Jolla and Rincon Indian Reservations are protected from floods. But the parties agree that the Rincon Band was shortchanged in its water entitlement under Mutual's 1924 license, and the controversy centers on the amount rather than the existence of the shortfall.

an adequate supply of water. We find, therefore, pursuant to Section 10(a), that it is necessary to modify Project No. 176, and particularly the water rights used and useful in connection therewith, in order to secure the project which is best adapted to a comprehensive plan for beneficial public uses.

—(*Indian Service Area*)

The "Indian Service Area" is both a geographic area which is approximated by shading on Appendix A and a concept under which portions of the La Jolla, Rincon and San Pasqual Indian Reservations are to be furnished water to avoid arguable or unquantified interferences or inconsistencies, in the cases of La Jolla and Rincon, and to induce any permission which arguably may be required under the Mission Indian Relief Act and the Indian Reorganization Act, in the case of San Pasqual.

The demands of the Escondido and Vista service areas regularly exceed the capacity of the San Luis Rey River to supply water through the Escondido Canal, and the resulting shortfalls are satisfied by purchases from MWD and deliveries through the San Diego Aqueducts. Consequently, every additional acre-foot of water which is utilized by an existing or new customer must be obtained from MWD. Similarly, every acre-foot of water which is utilized by an Indian must be replaced by an acre-foot obtained from MWD. In both cases—additional consumption by existing or new customers, and new consumption by Indians—the effect upon the volumes and costs of the Escondido and Vista distribution systems will be as small, or as great, and as slow, or as fast, as the additional or new consumption places demands upon the systems. It is therefore apparent that the Indians along the Escondido Canal can be furnished water to meet their requirements throughout the term of the power

license issued herein without affecting the Escondido and Vista distribution systems differently from the other demands which are placed upon those systems.

There are several origins to the concept of furnishing the Indians along the Escondido Canal with sufficient water to meet their requirements.

First, the agreement of February 2, 1914, which quantified the Rincon Band's six cubic feet per second entitlement, was incorporated into Mutual's 1924 license on Interior's recommendation. Today, however, Interior says that the continued efficacy of that contract, among others,¹⁸⁶ is subject to serious legal challenge.¹⁸⁷

Second the presiding judge would incorporate the agreements of February 2, 1914, and June 28, 1922, into a new license, apparently to require six cubic feet of natural flow to be delivered to each of the Rincon and Pala Bands, and would require in his Article 40 that an equal quantity of water be delivered for the use of the other Bands. Mutual, Escondido and Vista vigorously oppose his Article 40 principally on the ground that it is precluded by Section 27 of the Federal Power Act, but also because it is unreasonable and ambiguous. Principally because of a lack of clarity, we agree with them that the presiding judge's proposed condition should be rejected.

Third, the agreements of June 4, 1894, February 2, 1914, and June 28, 1922, are natural starting points for determining the volumes and/or flows of water which would preclude a power license from interfering or being inconsistent with

¹⁸⁶The other contracts are dated June 4, 1894, providing an "ample supply and quantity of water" for the La Jolla and Rincon Bands, and June 28, 1922, recognizing the prior first rights of the Rincon and Pala Bands to six cfs of natural flow.

¹⁸⁷The challenges are premised principally upon legal technicalities in the execution of the contracts.

the purpose of the reservations; but, as indicated, the continued validity of those agreements is questionable and they are subject to various degrees of ambiguity. Perhaps the most serious obstacle to such a quantification is that any resolution of volumes and/or flows might be characterized as an adjudication of water rights, which the parties agree is not within the scope of this proceeding.

And fourth, Article 14 of Mutual's 1924 license provides,

“The Licensee will interpose no objections to, and will in no way prevent, the use of water for domestic purposes or corporations occupying lands of the United States under permit along or near any stream or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by this license.”

That provision is a predecessor to Article 18 of the Commission's Form L-16 (as revised October 1975) standard license conditions which are attached to and made a part of the power license issued herein, and to Article 18 of other standard license conditions enumerated in 18 CFR § 2.9. Members of the La Jolla, Rincon and San Pasqual Bands living upon lands individually patented to them along or near the Escondido Canal are clearly persons occupying lands of the United States “under permit” within the meaning of the 1924 and current provisions and, as such, they are clearly entitled to use water from the Escondido Canal for domestic purposes. Arguably, all of the members of those Bands living upon lands patented to the respective Bands are entitled to use water from the Escondido Canal for domestic purposes. And since the provision in question dates back to a period in which our country was more agrarian than at present, arguably the use of the water for domestic purposes would include its use for agricultural and

stockwatering purposes incident to the occupation of the lands.¹⁸⁸

Article 29 attempts to satisfy the requirement of the first proviso of Section 4(e) that the power license issued herein may not interfere or be inconsistent with the water supplies of the La Jolla, Rincon and San Pasqual Indian Reservations, in the light of the obstacles in determining the historic natural supplies of those reservations and the controlled supplies which would preclude such interference or inconsistency, both currently and for the term of the license. It is essentially a merger of the 1894 principle of providing an "ample supply and quantity of water" and Article 18 of Form L-16 (as revised October 1975) which allows at least some of the Indians along the Escondido Canal to take some of the water from that conduit. Article 29 supplements Article 18 insofar as it renders it unnecessary for the Commission to decide upon the parameters of Article 18, including, whether only some, or all, of the Indians can take water; whether only some, or all, of the reservation lands are covered; and whether agricultural and stockwatering consumption is included within "domestic" consumption.

Since portions of the La Jolla and Rincon Indian Reservations are disadvantaged in their water supplies by the diversion into the Escondido Canal, the Indian Service Area is defined as including those portions of those reservations which are downstream from the crest of the spillway of the diversion dam, which geographic area approximates the portions of those reservations which are so disadvantaged. As an inducement to holding down costs in relocating part of the Escondido Canal, the Indian Service Area also includes portions of the San Pasqual Indian Reservation which are or will continue to be occupied by that conduit, which oc-

¹⁸⁸The current provision allows the use of the water for "sanitary and domestic purposes", as well as for fire suppression.

cupation arguably¹⁸⁹ requires the consent of the San Pasqual Band under the Indian Reorganization Act. If the conduit is relocated entirely off that reservation, the specified portions thereof will no longer be included within the Indian Service Area.

The Indian Service Area as so defined includes the small portion of the La Jolla Indian Reservation which would be irrigated from the Escondido Canal under the Bands' proposal for a license,¹⁹⁰ and substantially all of the Rincon Indian Reservation. It also includes approximately half of the irrigable lands of the San Pasqual Indian Reservation, which also approximates the portion of that reservation which lies within the San Luis Rey watershed.¹⁹¹

—(*Diversions of Water*)

Article 29 does not limit the volumes and flows of water which may be diverted from the Escondido Canal, other than the limits imposed by the Commission authorization

¹⁸⁹See LICENSING ISSUES—Section 16 of the Indian Reorganization Act. Although it is reasonable to relocate part of the Escondido Canal off the San Pasqual Indian Reservation in order to make the land available for reservation purposes, there is no reason to authorize its relocation completely off that reservation other than to preclude the San Pasqual Band from having a possible *de facto* veto over the power license issued herein. The annual charges provided herein may not be sufficient inducement for their consent. Accordingly, it is reasonable to modify Project No. 176 pursuant to the authority of Section 10(a) to provide water to the San Pasqual Band as an added inducement for their consent.

¹⁹⁰Mutual, Escondido and Vista contend that the 1894 agreement is still in force as to the La Jolla Band and, therefore, the La Jolla Band can tap the Escondido Canal at reasonable places to make beneficial use of water for domestic and agricultural purposes.

¹⁹¹Article 28 contemplates a possible redesignation of the "Indian Service Area" in conjunction with or following the final disposition of the pending litigation involving the water and related contractual rights which are incident to Project No. 176.

for a particular diversion.¹⁹² It contemplates that the limits will be increased from time to time as the Indians demonstrate that they are utilizing their existing limits, or are approaching those limits, and consequently that they need higher limits to satisfy their reasonably foreseeable needs.¹⁹³ And it provides water during the summer whenever there are sufficient volumes and flows in the Escondido Canal, and flexibility for changing needs and technology.

All water diverted pursuant to Article 29 must be utilized within the Indian Service Area for domestic, agricultural, stockwatering and/or small commercial consumption. "Small commercial" consumption includes any business which reasonably services the changing populations of the reservations and surrounding areas. No water diverted pursuant to Article 29 may be sold or otherwise disposed of for consumption out of the Indian Service Area or for purposes

¹⁹²But Article 28 contemplates limits being placed upon such volumes and/or flows in conjunction with or following the final disposition of the pending litigation involving the water and related contractual rights which are incident to Project No. 176. Until then, it is anticipated that any diversions in excess of the historic diversions will not be substantial because the three Bands do not have sufficient funds for irrigation facilities and agricultural development to make substantial use of the water, and because it is unlikely that they can obtain such funds so long as their water and related contractual rights are being litigated.

¹⁹³The first proviso of Section 4(e) and the Winters doctrine have a common denominator in that both look toward the purpose for which a reservation is created. Since the Winters doctrine involves a reservation of the use of water, as distinguished from an appropriation, a junior appropriator may use the water until it is presently needed for the purpose of a senior reservation of the water. *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (CA9, 1956). Assuming, therefore, that the La Jolla, Rincon and San Pasqual Bands have reserved water rights which are senior to the appropriated water rights of Mutual and Vista, the Winters doctrine would not preclude Mutual and Vista from diverting the water for consumption in their respective service areas as long as, and to the extent that, the water is not presently needed for the purpose of the three reservations. Article 29 is, therefore, consistent with whatever Winters doctrine rights the three Bands might have.

other than those specified in Article 29.¹⁹⁴

Article 29 does not preclude Mutual, Escondido and Vista from closing the Escondido Canal or portions of it for reasonable periods of time for scheduled maintenance and both scheduled and unscheduled repairs, or for other prudent reasons. Nor does it preclude them from restricting the flow in the Escondido Canal pursuant to any operating plan which is approved under Article 27. Furthermore, Article 29 recognizes the geographic differences between the Indian Service Area and the Escondido and Vista service areas, and does not require distribution services within the Indian Service Area, such as filtration, flouridation and year-round service. The Indians must make arrangements and pay for those services to the extent available if they are desired. In particular, the Indians must be prepared to obtain water from other sources when the Escondido Canal is closed.

—(*Authorization of Diversions*)

All diversions of water pursuant to Article 29 must be authorized in writing by the Commission, first, to enable the Commission to pass upon modifications of project works, and second, to enable Mutual, Escondido and Vista to plan their needs in the light of authorized volumes and flows.

¹⁹⁴Since water is reserved under the Winters doctrine to fulfill the purpose for which a reservation is created, and since the quantity of water which is so reserved is "enough . . . to irrigate all the practicably irrigable acreage" (*Arizona v. California*, 373 U.S. 546, 600), it is reasonable to assume that the water cannot be sold for off-reservation consumption. Indeed, in *Tweedy v. The Texas Company*, 286 F. Supp. 383 (D. Mont., 1968), the court refused to award damages for an appropriation (taking) of water from the Blackfeet Reservation, stating (at 386), "the plaintiffs have demonstrated no use of the water and no need for it—they have shown no right which the defendant has invaded." By refusing to award damages, the court refused to condone a sale of the water which had been taken and which was not then needed to fulfill the purpose for which the reservation was created.

Diversions by or on behalf of the La Jolla, Rincon and San Pasqual Bands, or enrolled members or groups of members of the respective Bands evidencing written authority to apply for diversion authorization, may be authorized by the Commission, or its designees pursuant to delegated authority. Diversions by or on behalf of Indian-oriented corporations or other entities must be authorized by the Commission proper. The latter are not specifically mentioned in Article 29 and will be considered on a case by case basis upon proof that the diversions will inure to benefit of the respective Bands and/or their members.

Article 29 establishes the basic right to divert water from the Escondido Canal and contemplates that authorization of such diversions will become routine. It contemplates that requests for specific volumes and flows, and plans and specifications for any diversion facilities to be installed or constructed, will be presented to and approved by Mutual, Escondido and Vista before being submitted to the Commission. Requests for specific volumes and flows should be based upon current utilization and realistic plans to expand utilization during a reasonable foreseeable period, such as five years. When the limits have been reached, or in anticipation of reaching them, either before or after the end of that period, requests for new specific volumes and flows may be made. Plans and specifications for diversion facilities, on the other hand, may look further to the future as it would not appear prudent to enlarge diversion facilities with each enlarged diversion entitlement. Such requests, and any objections to the requested volumes and flows or diversion facilities, ordinarily will be acted upon by the Commission, or its designees pursuant to delegated authority.

—(*Monitoring Diversions*)

The devices for monitoring compliance with Article 29 and the authorizations thereunder are to be installed, operated and maintained at the expense of those to whom the

authorizations are granted. Furthermore, Mutual, Escondido and Vista are to have reasonable access to the La Jolla, Rincon and San Pasqual Indian Reservations and the monitoring devices to enable them to make sure that water diverted pursuant to Article 29 is not sold or otherwise disposed of for consumption out of the Indian Service Area or for purposes other than those specified in Article 29.

We expect that the Pala and Pauma Bands, among others whose lands overlie the Pala and Pauma Basins, will benefit from the increased percolation of irrigation waters into the Pauma Basin incident to increased irrigation of the Rincon Indian Reservation resulting from Article 29. Such benefits are contemplated by the comprehensive plan for beneficial public uses which is adopted herein. Irrigation of the Rincon Indian Reservation principally for the purpose of recharging the Pauma Basin, on the other hand, is not contemplated and, in fact, is a prohibited use of the water. Although the amount of water applied to the Rincon Indian Reservation over time and in the light of particular acreage, crops and soil types could prove to be a sensitive aspect of monitoring, nonetheless, such monitoring is contemplated by Article 29.¹⁹⁵

Annual Charges (Article 30)

Annual charges for reimbursing the United States for the cost of administering Part I of the Federal Power Act, and for compensating the United States for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations, ordinarily are determined in accordance with 18 CFR §§ 11.20 and 11.21 and are not,

¹⁹⁵The reduction of annual charges incident to excessive irrigation should operate as a deterrent.

therefore, in issue.¹⁹⁶ Annual charges for the use, occupancy and enjoyment of tribal lands embraced within Indian reservations are determined in accordance with Section 10(e) of the Federal Power Act, and are subject to the criterion therein that they must be "reasonable". The United States Court of Appeals for the District of Columbia Circuit said, in this connection, in *Montana I*, *supra*, 298 F. 2d, at page 340,

"The question is . . . whether the end result is a reasonable one, as the statute requires it to be."

All of the parties are in general agreement that the annual charges or rentals for the tribal lands should be related to their value. Mutual, Escondido and Vista would utilize the fair market values of the lands, arguing that values are utilized by the Commission in 18 CFR § 11.21 in fixing annual charges for lands of the United States other than tribal lands. The Bands and Interior, on the other hand, would relate the annual charges for the tribal lands to the value of Project No. 176 as measured by the water benefits and part of the power benefits conferred upon Mutual, Escondido and Vista by the power license issued herein. Variations of the "sharing of the net benefits" approach, as it is called, are supported by the Commission staff through two witnesses.

— ("Fair Market Value" Rejected)

Under the fair market value concept of Mutual, Escondido and Vista, the mountainous lands of the La Jolla and Rincon Indian Reservations have relatively low values and com-

¹⁹⁶Nonetheless, in the special circumstances of this case and as permitted by § 11.21(b), we find that conditions warrant an adjustment from the regulatory formula and that the United States should be compensated for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations, in the same manner as such tribal lands.

mand commensaterately low annual charges (\$80 for La Jolla and \$2,250 for Rincon), while the comparatively flat lands of the San Pasqual Indian Reservation have a relatively high value and command a commensurately high annual charge (\$7,600).

We do not doubt that the mountainous lands of the La Jolla and Rincon Indian Reservations have lower unit market values than the flatter lands of the San Pasqual Indian Reservation, but those mountainous lands are unique in that they contain the only known gravity route for a water conduit from the point of diversion to Lake Wohlford. A study in the record indicates that topographic factors preclude an economic rerouting of the Escondido Canal so that it would not occupy the three Indian reservations. If that is so, the lands of those reservations occupied by the Escondido Canal have unique values which are greater than and distinguishable from their fair market values.¹⁹⁷

The same study indicates that 58% of the total rerouting cost would be attributable to the mountainous lands of La Jolla, 31% to the mountainous lands of Rincon and only 11% to the comparatively flat lands of San Pasqual. If the relative cost of rerouting the Escondido Canal around the respective reservations is a criterion of the relative values of the lands of those reservations to Project No. 176, the application of fair market values to those lands does not produce a reasonable result. The more mountainous lands with the lowest unit market values would have the greatest relative value to the project, and the comparatively flat lands

¹⁹⁷The study suggests that the use of the mountainous La Jolla and Rincon lands for a water conduit is the most profitable use for which they are suitable, and that the flatter San Pasqual lands might be suitable for uses which are more profitable than conveying water. See the discussion of Interior's Condition 8 under LICENSING ISSUES — First Proviso of Section 4(e) — Interior's Conditions.

with the highest unit market values would have the lowest relative value to the project.

We are directed by Section 10(e) of the Federal Power Act to fix reasonable annual charges for the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands involved herein. While those lands obviously have different market values from one another, they are used for the single purpose of conveying water from the San Luis Rey River watershed to the Escondido Creek watershed.¹⁹⁸ Aside from questions pertaining to the level of annual charges, the application of fair market value principles requires the assignment of different unit values to the lands along that conduit on the basis of their physical locations and characteristics. If we are to fix compensation for the use, occupancy and enjoyment of the lands, it would appear to be more appropriate to assign values on the basis of their relative importance to the purpose

¹⁹⁸There are two exceptions. Some of the lands within the Rincon Indian Reservation are used to generate electric power, for which separate power benefits will be fixed. And some of the lands within the La Jolla Indian Reservation are used for the diversion facilities (including a caretaker's cottage), which are claimed to have special value because they mark the point from which water flows by gravity alone to the Escondido Creek watershed. If such lands have special value, as claimed, the appropriate way to measure and allocate that value within the scheme of Article 30 is to assume that the diversion facilities are moved upstream just beyond the eastern border of the reservation, and that a pipe capable of conveying 70 cfs of water is laid in the bed of the San Luis Rey River to the existing conduit so that water could continue to flow (from a point off the reservation) by gravity alone to the Escondido Creek watershed. The La Jolla Indian Reservation would thereby receive a larger share of the annual charges resulting from the extension of the conduit within its boundaries, but at the expense of the Rincon and San Pasqual Indian Reservations whose shares would thereby be diluted. On the other hand, the La Jolla Indian Reservation would thereby lose its Henshaw-controlled fishery benefits within the same reach of the San Luis Rey River and, as a result, we find that those fishery benefits are a reasonable exchange for any special water conveyance value which might be attributable to the lands occupied by the diversion facilities.

for which they are used which, in this instance, is the conveyance of water.

We find, in this connection, that *every foot of the Escondido Canal is as important to its water conveyance value as every other foot*. And we can conceive of no rational basis for allocating its water conveyance value among the beneficial owners of the lands occupied by the Escondido Canal other than on a linear foot or acreage-occupied-by-the-right-of-way basis. We prefer the former because the right-of-way is not uniform through-out and because it facilitates the inclusion of the Lake Wohlford project area.

— (*Benefits Claimed by the Three Bands*)

The Bands and Interior contend that the La Jolla, Rincon and San Pasqual Bands are entitled to receive annual charges only for the benefits which are attributable directly to the tribal lands of those Bands which are occupied by Project No. 176. Specifically, they claim 100% of the water conveyance benefits and 100% of the Rincon power benefits which they say comprise less than one-third of the dollar value of the project's total benefits. Conversely, they do not claim Bear Valley power benefits, Lakes Henshaw and Wohlford recreation and storage benefits, flood control benefits and Warner Ranch agricultural benefits, none of which are attributable directly to tribal lands.¹⁹⁹

Except for the percentage of the benefits claimed by the Bands and Interior, which is considered next, we find that their approach is reasonable and that there is no need to

¹⁹⁹Although they contend that water quality differential benefits are attributable directly to tribal lands, they do not seek annual charges for them because it is believed that they will diminish or disappear with the introduction of high quality northern California water into one or both of the San Diego Aqueducts. Furthermore, they concede that the differential is offset to some extent by the uncertainty of the San Luis Rey water supply.

give further consideration to project benefits not directly attributable to tribal lands. In the circumstances of this proceeding we reject the approach of the two staff witnesses who would evaluate all of the project benefits, including those not directly attributable to tribal lands.

— *(Fifty/Fifty Division Applies to Relicense Periods)*

The benefits which are derived from a water power project are attributable partly to the land on which the project works are situated and partly to the improvements comprising the project works. In allocating the relative contributions of the land and improvements to those benefits for the purpose of fixing annual charges, it is equitable to assign 50% of the benefits to the land and the other 50% to the improvements because there is no rational basis for any other division.²⁰⁰

Conversely, allocations ordinarily are not based on the relative amounts invested in the land and improvements. Investments might not have been made in the land, as in this case; or investments might have been made in the land and improvements at times when dollar values were materially different, as in the case of additions to existing projects. And allocations heretofore have not taken into consideration whether a particular initial licensing pertained to an unconstructed project or a constructed project.

The Bands and Interior contend on exception that a 100/0 allocation should be made in favor of the land (and consequently the La Jolla, Rincon and San Pasqual Bands), rather than a 50/50 allocation, when previously licensed

²⁰⁰In fixing annual charges we are concerned with allocating the benefits of a water power project between two kinds of capital, land and improvements. We are not concerned with allocations among the economic elements of capital, labor and management.

facilities are relicensed.²⁰¹ They argue:

“The original licensee has no more equitable, moral or economic interest in the project works at the end of the license period than anyone else. It has a right only to its net investment. Licensees were to earn their return and reap their harvest during the first 50 years. If they are not entitled to a preference in a Section 15 relicensing, then neither are they entitled to any special consideration in fixing annual charges.”

As discussed under FEDERAL TAKEOVER NOT RECOMMENDED, the net investment concept merely provides a formula under which an acquisition price to the government or new licensees can be determined. The “sharing of the net benefits” concept, on the other hand, provides a formula under which a reasonable rental for the use, occupancy and enjoyment of tribal lands can be determined. If allocations of net benefits in initial licenses are not based on (1) the relative amounts invested in land and improvements, or (2) whether an initial license pertains to a constructed or unconstructed project, there is no reason to allocate net benefits in relicenses on the basis of whether existing improvements are acquired by new licensees at no cost (zero net investment) or a substantial cost (condemnation), or on the basis of whether new licensees make additional improvements, or the relative value of those improvements.

The owners of the land and improvements utilized in a water power project are entitled to share the net benefits of that project for however long the land and improvements

²⁰¹They state, “When there is no investment required or contemplated for the new license period, there is no reason to make that initial 50-50 apportionment.” Since the power license issued herein contemplates new investment in connection with rerouting of the Escondido Canal and the Henshaw facilities, the issue is moot.

continue to produce those benefits, whatever the relative cost of the improvements to the new licensees and notwithstanding that improvements are depreciable while land is not, and whether they are carried on the books of account at a substantial or nominal value. The compensation for the use, occupancy and enjoyment of the tribal lands is being fixed for the new license term; the licensees under the new license are as much the owners of the improvements as was the licensee under the old license; and the new licensees are entitled to the same share of the net benefits as the former licensee. Accordingly, we find no basis for departing from a 50/50 allocation of net benefits by reason of the fact that the power license issued herein includes previously licensed facilities.

— (*Formula Annual Charge Approach*)

Section 10(e) provides, in pertinent part, that annual

“charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing. . . .”

In view of the fact that a project ordinarily has been in service more than twenty years when the operation and maintenance of its works are relicensed, we construe the foregoing provision as precluding the Commission from readjusting annual charges for the period ending ten years after the annual charges fixed by the new license go into effect.

Although Section 10(e) also speaks of “an amount to be fixed by the Commission,” we construe those words as permitting the dollar amount of annual charges to change from year to year under the provisions of a formula which is fixed by the Commission and which cannot be readjusted

for the twenty and ten year periods specified therein. The formula approach is supported by the Bands, Interior and the Commission staff, and is opposed, but apparently not strenuously, by Mutual, Escondido and Vista.

We find that the formula approach is particularly useful because certain events will occur during the 10-year non-readjustment period which will affect significantly the net water benefits of Project No. 176 in amounts and at times which cannot accurately be projected. Among those events: Depreciation charges reducing net water benefits will be incurred when the Escondido Canal is relocated in part off the San Pasqual Indian Reservation, and depreciation charges which will be even more significant will be incurred when Henshaw Dam and the pumping facilities on Warner Ranch are modified. Water consumption by Mutual's and Vista's customers is moving from agricultural to domestic, thereby increasing the cost of an alternative supply of water and increasing net water benefits. And the Rincon Band, and possibly the La Jolla and San Pasqual Bands, will be diverting water from the Escondido Canal, thereby reducing net water benefits.

While the parties are at issue with respect to whether the Commission is required to allocate annual charges among the Bands, we interpret Section 17(a) of the Federal Power Act as requiring the Commission to do so:

"All proceeds from any Indian reservation shall be placed to the credit of the Indians of *such* reservation. All *other charges* arising from licenses hereunder . . . shall be paid into the Treasury of the United States. . . ." (Emphasis added.)

The term "other charges" in the second sentence indicates that the first sentence includes annual charges for the use, occupancy and enjoyment of tribal lands, and the term "such" in the first sentence indicates that the Commission

must allocate those charges among the La Jolla, Rincon and San Pasqual Bands.

Since annual charges are being allocated among the beneficial owners of the lands occupied by the Escondido Canal on a linear foot basis, and since the three Bands will be affecting those annual charges by diverting water from that conduit, and since the Bands presumably will not be diverting water equally or ratably, the formula approach provides a vehicle for adjusting the allocation for the relative diversions of water by the three Bands.

Finally, none of the six witnesses testifying with respect to annual charges appears to have considered that the annual charges of one year will become operating expenses of Project No. 176 which will reduce the annual charges of the following year. The formula approach will reflect such rental expenses.

— (*Step 1: Determine the Net Water Benefit*)

The first step under the formula approach of Article 30 is to determine the Net Water Benefit of Project No. 176, which is the annual difference in the cost of obtaining San Luis Rey water through Project No. 176, and the cost of obtaining the same volume of water from the least expensive alternative source which, in this case, is MWD.

The definitions in Article 30 of the terms "Net Canal Water", "Cost of Canal Water", "Cost of Alternative Water; and "Net Water Benefit" delineate the principles but not the details of determining the Net Water Benefit. The details will be determined from year to year by the Director of the Division of Licensed Projects, Office of Electric Power Regulation, or that officer's Deputy. It is expected that questions requiring resolution will arise in connection with the initial determination and possibly in connection with subsequent determinations when new fac-

tors possibly affecting the Net Water Benefit arise. It is intended that the initial determination will serve as a guide to subsequent determinations.

As a guide, we would note that it should make no difference whether general and administrative expenses are included in, or excluded from, the computations; costs which would be incurred whether the water is obtained from the San Luis Rey River or MWD will result in a zero differential and, consequently, will not affect the amount of the Net Water Benefit. On the other hand, computed costs associated with MWD water facilities which would be required to replace existing facilities which bring San Luis Rey water to the Escondido and Vista service areas, including storage facilities, should be allowed. But any computed costs which would represent improvements to existing facilities, as distinguished from replacements of those facilities, or which would be associated with water quality differentials, should not be allowed.

Since MWD charges different rates for domestic and agricultural water, the Cost of Alternative Water to Mutual/Escondido would be derived by applying the domestic/agricultural distribution percentages for the Escondido service area for a given year to MWD's domestic/agricultural rates for that year, to derive a weighted average cost of water, and to apply that cost to Mutual's share of Net Canal Water for the same year. Similarly, the Cost of Alternative Water to Vista would be derived by applying the domestic/agricultural distribution percentages for the Vista service area for the same year to MWD's domestic/agricultural rates, and to apply that cost to Vista's share of Net Canal Water for that year. The sum of Mutual/Escondido's and Vista's Cost of Alternative Water represents the direct cost of alternative MWD water to them.

The sum of Mutual/Escondido's and Vista's Cost of Alternative water should be adjusted for computed costs associated with facilities which would be required for a hypothetical changeover from partial to full MWD water service — substitutions without improvements, including an assumed comparability of water quality — to derive the cost of obtaining MWD water. Finally, the Cost of Canal Water would be deducted to derive the Net Water Benefit of Project No. 176 for the year.

— (*Step 2: Allocate the Net Water Benefit to Tribal Lands*)²⁰²

The second step under the formula approach of Article 30 is to allocate a portion of the Net Water Benefit to the lands of the United States and the tribal lands of the La Jolla, Rincon and San Pasqual Bands which are used and occupied by Project No. 176. It is also the most controversial step of the several proposed formulas, principally because the sponsoring witnesses have failed for the most part in their functionalizations of Project No. 176 in the manner approved in *Montana III*, *supra*, in their derivations of natural measurements and, consequently, in their allocations of functional benefits to the lands.

As we said earlier, the

“ . . . most significant value [of the San Luis Rey River and Escondido Canal], as all parties agree, comes from their ability to provide good quality and *relatively inexpensive* water for domestic and irrigation consumption in an essentially dry but fertile geographic area. Their water supply value, particularly as it relates to Henshaw-stored water for consumption during the dry summer period, dominates all other values in choosing among the competing proposals.” (Emphasis added.)

²⁰² Appendix B illustrates the allocation described herein.

To that we now add that they will continue to be of such value only as long as, and to the extent that, they can continue to convey water from the San Luis Rey watershed to the Escondido and Vista service areas at a lower cost than the cost of obtaining equal volumes of water from MWD through the San Diego Aqueducts. If the cost of San Luis Rey water should exceed the cost of MWD water, the Licensees would likely find that continued operation of Project No. 176 is uneconomic and file an application to surrender their license pursuant to Section 6.

Accordingly, the water supply value of Project No. 176 is attributable principally to the Henshaw development (including Warner Ranch), insofar as that development *gathers* and *stores* water for summer consumption (which is the "water" value), and to the Escondido Canal (including the Wohlford development), insofar as it *conveys* water from the San Luis Rey River basin to the Escondido Creek basin and the ultimate areas of consumption (which is the "supply" value).

It should be observed, in this connection, that the Escondido Canal conveyed the natural flow of the San Luis Rey River for almost thirty years before Henshaw Dam was constructed. The conduit was built even though the Henshaw development wasn't in existence. But Henshaw Dam would not have been constructed, at least without its own conduit, if the Escondido Canal wasn't available for enlargement. Under such circumstances, any water conveyed by the Escondido Canal which is attributable to the natural flow of the San Luis Rey River derives all of its economic value from the conveyance function of Project No. 176. But any water conveyed by that conduit which is attributable to the Henshaw development derives part of its economic value from the gathering/storage function of that development and part from the conveyance function of the Escondido Canal.

Since we can find no rational basis for allocating the economic value of Henshaw development water between the gathering/storage function of the Henshaw development and the conveyance function of the Escondido Canal, we will assign 50% of the value to the Henshaw development and the other 50% to the Escondido Canal, per the shaded part of the allocation arrow shown in Appendix B.

To determine the relative amounts of water which are attributable to the natural flow of the San Luis Rey River and to the Henshaw development, we turn to the testimony of a staff witness who made a study of the volumes of water which were diverted into the Escondido Canal from water-year 1897 through water-year 1922, just before Henshaw storage began, and from water-year 1923 through water-year 1970. The witness assumed that all natural flows originating upstream from the Escondido Canal (whether upstream or downstream from Henshaw Dam) up to 70 cfs on a monthly average were diverted into the Escondido Canal, and that all natural flows exceeding that average continued downstream past the Escondido Canal. On the basis of that study, which is not challenged, the witness estimated that without the Henshaw development "at least" 48% of the total natural flow from 1925 through 1970 would have gone past the Escondido Canal, and that with the Henshaw development only 7.4% of the total natural flow during the same period continued past that conduit.

It might be concluded from that testimony that up to 52% of the total natural flow would have entered the Escondido Canal in the absence of the Henshaw development, and that the latter contributed more than 40% (48% or more, less 7.4%) of the natural flow, or about 44% of the total water which entered that conduit. But the witness also testified,

"Whenever the total natural flow at the diversion was less than 70 c.f.s., I assumed all was diverted. When-

ever the total natural flow was greater than 70 c.f.s., I assumed that the monthly average excess spilled over the diversion. This is admittedly an approximation, since high flows do not happen as average monthly flows, but as irregular hydrographs. However, in the absence of daily or instantaneous discharge data, this is the best estimate I could make with the data available."

In view of that testimony, we conclude that the Henshaw development probably contributes more than 44% but not more than 50% of the total volume of water which enters the Escondido Canal. And for the purpose of allocating the Net Water Benefit of Project No. 176, we conclude that one-half of the water which flows through the Escondido Canal is attributable to the Henshaw development, and that the other one-half is attributable to the natural flow of the San Luis Rey River.²⁰³

Since Mutual owns substantially all of the improvements comprising the Escondido Canal but not the land on which it is situated, one-half of the Net Water Benefit which is attributable to the conveyance function of that waterway should be allocated to the Licensees, and the other one-half should be allocated among the beneficial owners of the land which is used and occupied by that conduit. The Net Water Benefit attributable to the conveyance function should be measured by the sum of (a) all of the natural flow water, which is 50% of the water flowing through the conduit, and (b) one-half of the Henshaw development water, which is an additional 25% of the water flowing through the conduit. In other words, the Net Water Benefit attributable to the Escondido Canal should be measured by 75% of the water

²⁰³The Henshaw development contributes one-half of the water which ultimately enters the computation of the Net Water Benefit.

passing through that conduit; and one-half thereof, or 37.5% should be allocated among the beneficial owners of the land on which it is situated.²⁰⁴

Since the Escondido Canal derives its economic value from the conveyance or transportation function which it performs, we are choosing a linear unit of measurement to allocate that value according to the distance traversed by that conduit, ratably among the owners of the land used and occupied by it. A linear unit is premised upon all of those lands contributing to that value ratably according to distance. It is superior to an area unit because it eliminates distortions resulting from the fact that the right-of-way is not uniform throughout, and resulting from the pack trails and access roads which contribute indirectly, but not directly, to the conveyance function.²⁰⁵

From Station 1 on the diversion dam, through Station 302A on the common boundary of the San Pasqual Indian Reservation and the Lake Wohlford project area, the Escondido Canal traverses lands which are classified as follows:²⁰⁶

²⁰⁴The other 62.5% should be allocated to the Licensees, consisting of the sum of (a) the other 37.5% of the Net Water Benefit which is attributable to the conveyance function and, therefore, should be allocated to the Licensees as the owners of the improvements, and (b) the other 25% of the Net Water Benefit which is attributable to the water flowing through the Escondido Canal, which is the other one-half of the Henshaw development water and should be allocated to the Licensees because Vista owns the improvements and substantially all of the land comprising the Henshaw development.

²⁰⁵As is discussed below, a linear unit also provides a vehicle for precluding a distortion by the Lake Wohlford project area.

²⁰⁶The figures are derived from the 1975 Exhibit K maps and differ somewhat from those contained in Exhibit B-94 which were derived from earlier Exhibit K maps. Because the distances from Station 279A (assumed with Station 281A to be on a boundary of the San Pasqual Indian Reservation) to Stations 279 and 280 are not shown on Exhibit K-8 (January 1975), the distance from Station 279 to Station 280 has been apportioned so that the length of the Escondido Canal through the San Pasqual Indian Reservation is consistent with Exhibit B-94.

	Linear Feet	Per Cent Linear Feet
La Jolla Indian Reservation	6,323	8.80
Rincon Indian Reservation	4,134	5.75
San Pasqual Indian Reservation	9,887	13.75
Total Indian Reservations	20,344	28.30
Private	10,593	14.74
U.S. Government (Non-Indian)	40,950	56.96
Total	71,887	100.00

If the United States is compensated pursuant to the formula in 18 CFR § 11.21(b) for the use, occupancy and enjoyment of its lands other than the tribal lands of the La Jolla, Rincon and San Pasqual Indian Reservations, such compensation currently would be considerably less than the allocative share of the Net Water Benefit attributable to those lands. Compensation pursuant to that formula would, therefore, violate the principle embodied within Article 30 that every foot of the Escondido Canal is as important to its water conveyance value as every other foot. And the difference between the compensation under that formula and the allocative share of Net Water Benefits would inure to the benefit of the Licensees, increasing the share allocated to them as owners of the improvements to more than 50%. Accordingly, compensation pursuant to that formula would also violate another principle embodied within Article 30 that 50% of the Net Water Benefit is to be allocated to the owners of the improvements, as such, and the other 50% is to be allocated to the owners of the land, as such.²⁰⁷

If, on the other hand, the non-tribal lands of the United States are excluded from sharing the Net Water Benefit

²⁰⁷More than 50% of the Net Water Benefit will inure to the benefit of the Licensees because they own some of the land as well as all of the improvements.

attributable to them, and the compensation pursuant to the formula in 18 CFR § 11.21(b) is deducted from that allocative share, so that the difference between that allocative share and that compensation is in turn allocated among the remaining lands occupied by the Escondido Canal, the result would also violate the principle that every foot of that conduit is as important to its water conveyance value as every other foot.²⁰⁸

Section 10(e) of the Federal Power Act condemns “excessive profits” in fixing annual charges and, therefore, to preclude such a result consistent with the other principles which are embodied within Article 30, we find that the special conditions of this case warrant an adjustment from the formula in 18 CFR § 11.21(b). We find that the Net Water Benefit of Project No. 176 should be allocated to the non-tribal lands of the United States according to the distance traversed by the Escondido Canal through those lands.

While Henshaw development gathers and stores water, and the Escondido Canal conveys water from one basin to another, the Wohlford development conveys and stores water within the basin of the Escondido Creek. For almost thirty years, of course, Wohlford-stored water represented the only significant summer supply in the Mutual/Escondido service area. But with the construction of Henshaw Dam and, later, with the availability of MWD water, the storage function of the Wohlford development became less critical to a reliable water supply. In fact, we do not perceive how its storage function adds to the Net Water Benefit of Project No. 176, at least in any way not subsumed by the Henshaw development. The Wohlford development generally stores only Mutual's water, and it does so only after that water

²⁰⁸While the result would benefit the three Bands principally, it would also benefit the Licensees as landowners.

has passed through the Escondido Canal. Certainly, in view of its geographic location, the Wohlford development cannot make more water available to the computation of the Net Water Benefit, and does not appear to warrant a separate percentage allocation as in the case of the Henshaw development.

On the other hand, the Wohlford development continues to perform a conveyance function which begins at Station 302A of the Escondido Canal and ends at Station 19 of the outlet pipe and penstock traverse at or near the Bear Valley power house, near the northeastern part of the Escondido service area. Arguably, that transportation function is less important than that of the Escondido Canal because it represents an in-basin conveyance rather than a trans-basin conveyance. However, if the two types of conveyances contribute differently to the Net Water Benefit of Project No. 176, the difference appears to be incapable of quantification, as does the contribution of the Wohlford development storage function to the Net Water Benefit.

The Escondido Canal and the Lake Wohlford project area are the principal components of the complete unit of development as it was originally constructed, and as licensed in 1924 as Project No. 176; and that unit of development derives its economic value principally from the conveyance function, but also from the storage function, which are performed by those components. Since we are unable to find any rational basis for allocating the relative contributions of such conveyance and storage functions to the Net Water Benefit of Project No. 176, we choose to treat them as a single conveyance/storage function for the purpose of allocating the Net Water Benefit.

Since Mutual owns substantially all (and Mutual and Vista together apparently own all) of the improvements comprising the unit of development consisting of the Escondido

Canal and the Lake Wohlford project area, 50% of the economic value attributable to the conveyance/storage function of that unit should be allocated to the Licensees. The other 50% of that value should be allocated to the owners of the lands used and occupied by those improvements. And since the conveyance function dominates the economic value of that unit of development, particularly as it relates to the trans-basin conveyance by gravity through the Escondido Canal, we are choosing the same linear unit of measurement to allocate that economic value according to the distance traversed by the Escondido Canal and the Wohlford development as a single unit, ratably among the owners of the land used and occupied by that unit.²⁰⁹

Although the 1975 Exhibit K maps do not contain sufficient information to determine the exact length of a traverse of the Lake Wohlford project area, and we are unable to find such information elsewhere in the record, that distance is partly computed and partly estimated from Exhibit K-10 (April 1975) as approximately 10,250 feet.²¹⁰ Of the 843 acres comprising the Lake Wohlford project area, 662 acres, or 78.53%, are owned by Mutual; and, consequently, 78.53% of the traverse, or 8,049 feet, will be classified as occupying "private" lands for the purpose of allocating the Net Water Benefit. Similarly, the remaining 181 acres or 21.47%, are

²⁰⁹Considering that the right-of-way of Project No. 176 at present cover 311.08 acres, and that the Lake Wohlford project area traverses about 1/7 the length of the Escondido Canal and occupies 843 acres, a linear unit of development provides a vehicle for precluding the numerically larger number of acres of Lake Wohlford storage lands from distorting the allocation of economic value.

²¹⁰While the approximation of 10,250 feet is used for the purpose of illustration and discussion in this Opinion and order, the actual linear distance should be used in computing the annual charges. The Licensees should file new Exhibit K maps which should include all traverse distances which are necessary for the computation of annual charges pursuant to the power licenses issued herein.

owned by the United States; and, consequently, 21.47% of the traverse, or 2,201 feet, will be classified as occupying lands of the United States. The traverses of the Escondido Canal and the Lake Wohlford project area are then combined into the following table:

	Linear Feet	Per Cent Linear Feet	Per Cent Indian
La Jolla Indian Reservation	6,323	7.70	31.08
Rincon Indian Reservation	4,134	5.03	20.32
San Pasqual Indian Reservation	9,887	12.04	48.60
Total Indian Reservations	20,344	24.77	100.00
Private	18,642	22.70	—
U.S. Government (Non-Indian)	43,151	52.53	—
Total	82,137	100.00	100.00

On the basis of the foregoing approximation, but subject to correct traverse distances and the future modification of the traverse of the Escondido Canal through the San Pasqual Indian Reservation, the United States would be entitled to 52.53% of the 37.5% of the Net Water Benefit of Project No. 176 which is allocated to the owners of the land occupied by the Escondido Canal and the Lake Wohlford project area, or an annual charge of approximately 19.70% of the Net Water Benefit each year applicable to its non-tribal lands. Similarly, the La Jolla, Rincon and San Pasqual Bands as a group would be entitled to 24.77% of the 37.5%, or an annual charge of approximately 9.29% of the Net Water Benefit each year. The further allocation of the annual charges among the three Bands is discussed next, and the reasonableness of the results is discussed under COMPLIANCE ISSUES — Reasonableness of Annual Charges.

—(Step 3: Allocate the Annual Charge Among the Three Bands)

The third step under the formula approach of Article 30 is to allocate the annual charge among the La Jolla, Rincon and San Pasqual Bands. Since the annual charge is an amount fixed as a rental for the use, occupation and enjoyment of the tribal lands, and since those lands are being treated as being equal in value for the purpose of fixing that rental, the annual charge should be allocated ratably among the tribal lands according to the distance traversed by the Escondido Canal through them. But since diversions of water from the Escondido Canal by the three Bands will reduce the Net Water Benefit of Project No. 176 and, consequently, the annual charge which otherwise would be paid, and since it is assumed that the three Bands will divert different volumes of water from one another and from year to year, the allocation of the annual charge among the three Bands should be adjusted for the relative diversions of water by them.

The foregoing objectives are accomplished by recomputing the amount of the annual charge on the assumption that the three Bands diverted no water during the year. In other words, the diverted volumes are added to the measured volumes which leave the Escondido Canal to determine the Gross Canal Water for the year, and that amount is utilized to derive a new and higher Cost of Alternative Water for computing a Gross Water Benefit for the year. On the basis of the same approximation and subject to the same conditions as in the preceding discussion, 9.29% of the Gross Water Benefit should be placed to the *tentative* credit of the La Jolla, Rincon and San Pasqual Bands as a group, representing the computed amount of the annual charge on the assumption that the three Bands diverted no water during the year. Of that computed annual charge, 31.08% should then be placed to the *tentative* credit of the La Jolla Band,

20.32% to the Rincon Band and 48.60% to the San Pasqual Band, according to the relative distances traversed by the Escondido Canal through their respective tribal lands.

The amount of the annual charge as originally computed should be deducted from the amount as recomputed on the assumption that the three Bands diverted no water during the year, to determine the amount by which the annual charge is reduced by the diversions of the three Bands during the year. That difference should then be allocated among the three Bands according to the measured volumes of water diverted from the Escondido Canal to their respective tribal lands pursuant to Article 29 during the year, and the amounts which are so allocated should be deducted from the amounts which were placed to the tentative credit of the respective Bands. Finally, the remaining amounts are those which should be placed to the credit of the La Jolla, Rincon and San Pasqual Bands, respectively, as required by Section 17(a) of the Federal Power Act.

—(Step 4: Determine and Allocate the Net Rincon Power Benefit)

If Mutual/Escondido²¹¹ and Vista were to lose their San Luis Rey water, they would have to obtain another supply since they are in the business of distributing water for consumption. It is appropriate, therefore, to measure the water benefits of Project No. 176 by the annual difference in the cost of obtaining San Luis Rey water through the project and the cost of obtaining the same volume of water from the least expensive alternative source. Conversely, their revenues from the sale of that volume of water are not an

²¹¹ Although Mutual sold the remaining part of its water distribution system to Escondido in conjunction with the 1970-71 tender offer and Operating Agreement, the court-approved arrangements are such that they are being treated as a single entity for the purpose of this discussion.

appropriate benchmark because they reflect additional costs associated with distribution services, such as filtration and chlorination.

Mutual's electric power distribution business, on the other hand, was sold to SDG&E in 1954 under arrangements whereby (1) Mutual continues to generate electric power at its two power plants and sells their output in excess of its own requirements to SDG&E, except insofar as Mutual is obligated under the agreement of February 2, 1914, to have power "constantly available whenever required for pumping water" by the Rincon Band, and (2) SDG&E sells electric power to Mutual for Mutual's and the Rincon Band's consumption whenever Mutual isn't generating power, or Mutual's generation is insufficient for its and the Rincon Band's requirements. As a result, Mutual would not have to obtain another supply if it were to stop generating electric power at its Rincon power house except for its own consumption and that of the Rincon Band. As a further result, and because Mutual performs no distribution services in conjunction with its direct sales to SDG&E and the Rincon Band, its revenues from such sales are an appropriate benchmark for measuring the power benefits of Project No. 176 to Mutual.

In other words, since Mutual is not in the business of distributing electric power, it is appropriate to measure the power benefits of Project No. 176 by the annual difference in the cost of generating Rincon power and the revenue derived from that power, subject to adjustment for Mutual's purchasing electric power and reselling it directly to the Rincon Band. And that is the difference between the so-called "net benefits" approach, which is applied herein to the water benefits of Project No. 176, and the closely related "profitability" approach, which is applied herein to the Rincon power benefits.

Under the formula approach of Article 30, the Net Rincon Power Benefit of Project No. 176 is the annual difference in the cost of generating electric power at the Rincon power plant and the revenues received from the sale of that power, plus or minus the gains and losses associated with the purchase of power from SDG&E and its resale to the Rincon Band.

Revenues and expenses associated with the sale and purchase of electric power should be allocated on the basis of the sum of all demand, energy and other charges associated with the number of kilowatt-hours involved. The number of kilowatt-hours purchased from SDG&E and resold to the Rincon Band should be included in the calculations to reflect the gains and losses associated therewith. The costs associated with the power consumed by Mutual in the operation and maintenance of its Rincon power plant should be reflected in the operation and maintenance expenses, whether the power which is so consumed is generated by the Rincon power plant or purchased from SDG&E.²¹² But the difference between the \$.00125 received for the sale of Rincon-generated power to the Rincon Band and the higher revenues which would have been received from the sale of that power to SDG&E, should be excluded from the computation.²¹³

As in the case of the water benefits, 50% of the Rincon power benefits will be allocated to the Licensees since Mu-

²¹²The costs associated with the power which is neither consumed in the operation and maintenance of the Rincon power plant, nor sold or resold to the Rincon Band, should be reflected elsewhere, such as in the operation and maintenance of the water supply facilities of Project No. 176.

²¹³The Rincon Band receives the benefit of the inexpensive power and should not receive a second benefit in the form of an upward adjustment of the revenues on which its annual charges are based. If the power supply arrangements between Mutual and the Rincon Band should be changed, as, for example, if the agreement of February 2, 1914, should be declared invalid, the formula approach of Article 30 will reflect the new arrangements.

tual owns the Rincon penstock and power house. And the remaining 50% will be allocated to the Rincon Band since it is the beneficial owner of all non-government lands used and occupied by those improvements.²¹⁴ Accordingly, the Rincon Band would be entitled to 50% of the Net Rincon Power Benefit of Project No. 176, which amount should be credited pursuant to Section 17(a) to that Band as an annual charge.

The substance of the presiding judge's proposed Article 37 is included in Article 30 in modified form to impose annual charges for the rights-of-way occupied by certain transmission lines for telephone and other services (the "wire lines") which are utilized by Project No. 176.²¹⁵ As the presiding judge indicated, the wire lines are principally in mountainous terrain where they follow convenient courses which result in technical trespasses without damage in fact. The annual charges are imposed only with respect to the rights-of-way occupied by those portions of the wire-lines which are situated within the La Jolla, Rincon and San Pasqual Indian Reservations and are outside of project boundaries. To the extent that the wire-lines are utilized only for project purposes, the annual charges would be the

²¹⁴Government lands other than tribal lands will be disregarded in this instance because they represent approximately 6% of the lands occupied by the Rincon penstock and power house, and because the Net Rincon Power Benefit is minor in comparison to the Project No. 176 Net Water Benefit.

²¹⁵The presiding judge would have fixed the amount at \$100 per mile. Although no objections have been raised as to that amount, it is not synchronous with the amount prescribed by the Commission's Regulations Under the Federal Power Act for the use of Government lands for transmission line rights-of-way only, which amount is approximately \$12.50 per mile for 1979 for the 20-foot wide rights-of-way occupied by the wire-lines in question. See TERMS OF THE TRANSMISSION LINE LICENSE. Since the servitude of those wire-lines is reasonably comparable to that of the Project No. 559 12 kV transmission line, the Commission's regulation applicable to transmission line rights-of-way only will be applied to the tribal lands in question.

same as those payable to the United States pursuant to the Commission's regulations for recompensing the United States for the use, occupancy and enjoyment of lands (for transmission line rights-of-way only) other than tribal lands embraced within Indian reservations. But the annual charges would be one-half of those computed in accordance with the Commission's regulations to the extent that the wirelines are utilized by both Mutual, Escondido or Vista, and the La Jolla, Rincon or San Pasqual Bands. And the annual charges should be credited to the respective Bands in proportion to the acreage occupied within their respective tribal lands by the wireline rights-of-way for which they are imposed.

Sharing the Cost of Canal Water (Article 31)

So long as diversions of water to the Indian Service Area approximate the historic diversions to the Rincon Indian Reservation, there will be little or no economic impact upon the Project No. 176 ratepayers since they will be subsidizing essentially the same proportionate amounts of water as in the past.²¹⁶ But the La Jolla, Rincon and San Pasqual Bands

²¹⁶The agreement of June 4, 1894, speaks of furnishing an ample supply and quantity of water to the La Jolla and Rincon Bands at the expense of Mutual's predecessor, and provides, further,

"That the right to the free use of a sufficient quantity of water from the flume or canal of said company as hereinbefore stipulated shall continue and be in force so long as the Indians shall reside upon the said reservations. . . ."

As we understand that agreement, the La Jolla and Rincon Bands would not be charged for their water, and the costs applicable to the water used by them would be "absorbed" by Mutual's predecessor and subsidized by its ratepayers.

Insofar as concerns the Rincon Band, that agreement was superseded by the Agreement of February 2, 1914, which quantified that Band's entitlement at six cubic feet per second, measured at or near the intake of the Escondido Canal, and then provided that Mutual would sell electric power to the Rincon Band at specified rates for the purpose of pumping water

" . . . so that when the pumped water is added to the water which passes through the power plant, said Indians will have all the water needed for their use, not to exceed six cubic feet per second. . . ."

say that they have a plan to increase significantly their agricultural acreage and, consequently, their consumption of water. And to the extent they are successful, they will reduce the volumes of water which are available to the Project No. 176 ratepayers and cause the operating costs to be recovered over increasingly smaller volumes of water. The result will be to drive up the cost of San Luis Rey water, possibly to the point of causing abandonment of Project No. 176.

Article 31 of the power license issued herein provides a more equitable approach by requiring the La Jolla, Rincon and San Pasqual Bands to share the operating costs of Project No. 176 with Mutual, Escondido and Vista if they are going to divert water from the Escondido Canal. Three witnesses estimate that from 8.77% to 9.53% of the water which flowed through the Escondido Canal from the mid-1920's to 1970 was diverted to the Rincon Indian Reservation. Since it is generally agreed that the Rincon Band was short-changed during the period covered by those estimates, and particularly since the inflows from *all* of the tributaries of the San Luis Rey River into Lake Henshaw were never measured, Article 31 provides that there will be no sharing of operating costs for any year in which diversions of water to the Indian Service Area are less than 12% of the volume

Since the United States pays for such power, the costs applicable to pumping the water used by the Rincon Band are subsidized by the nation's taxpayers.

Although "free" water might be furnished to the Indian Service Area pursuant to Article 29, the water cannot be free in the larger economic sense since the costs of operating Project No. 176 ultimately must be borne by the ratepayers who consume the water. Under the power license issued herein, diversions of water to the Indian Service Area will reduce the Net Water Benefit of Project No. 176 and, consequently, the annual charges which are based upon the Net Water Benefit. Certainly, under such circumstances, the water diverted to the Indian Service Area is not entirely free.

of water flowing through the Escondido Canal. In other words, Article 31 retains the concept of "free" water for the three Bands and subsidization by the Project No. 176 ratepayers whenever the amount of water diverted from the Escondido Canal does not exceed approximate historic levels.²¹⁷

For any year in which diversions of water are at least 12% but less than 13% of the volume of water flowing through the Escondido Canal, the three Bands as a group would reimburse Mutual, Escondido and Vista 1.5% of that part of the Cost of Canal Water, as that amount is ultimately approved pursuant to Article 30, which is applicable to the facilities situated upstream from the metering or measuring device to be installed at or near the terminal structure. The percentage of reimbursement would then increase by 1.5% for each 1% increase of aggregate diverted volumes on the hypothesis that larger diversions signify a greater ability to share operating costs. For any year in which the diverted volumes equal or exceed 33% of the water flowing through the canal, the three Bands would reimburse Mutual, Escondido and Vista that same percentage of the applicable part of the Cost of Canal Water.

Since the Commission does not have jurisdiction over the La Jolla, Rincon and San Pasqual Bands, as such, Article 31 provides that the obligation of Mutual, Escondido and Vista under Article 29 to permit diversions of water to the Indian Service Area shall be suspended during any period

²¹⁷While Article 31 retains that concept to the extent indicated as between the Bands and Licensees, the fact that annual charges are allocated among the three Bands, in part, in accordance with the relative diversions of water by them, results in an exchange among the three Bands of water for cash annual charges. Such an exchange would be particularly apparent if the Rincon Band becomes a net obligor as discussed in Footnote 218.

of time in which the amount due from a particular Band under Article 31 remains unpaid.²¹⁸ Article 31 provides for the suspension of the obligation but does not require the suspension of service; it permits arrangements for the payment of delinquencies. On the other hand, Article 31 does not permit the suspension of service to one reservation because of the delinquency of the Band of another reservation.

Contractual Obligations to Indians (Article 34)

Article 34 embodies the substance of Interior's Condition 9²¹⁹ in general terms, and requires Mutual, Escondido and Vista to use their best efforts to fulfill their valid contractual obligations to supply electric power and water to the Bands, subject to the terms and conditions of the power license issued herein and the applicable contractual agreements. Among other obligations, and until determined otherwise in the pending litigation involving the water rights incident to Project No. 176 and the final disposition thereof, or in other litigation, Article 34 requires Vista to drill wells and

²¹⁸The distance traversed by the Escondido Canal through the Rincon Indian Reservation is 20.32% of the distance traversed through the three reservations. Since 20.32% of the annual charge attributable to water benefits would therefore be placed tentatively to the credit of the Rincon Band, to be reduced in proportion to that Band's share of the water diverted to its reservation, and since the Rincon Band is expected to become the dominant consumer of Escondido Canal water among the three Bands, it could conceivably become an obligor in allocating that annual charge among the Bands. Accordingly, Article 31 also applies to amounts due under Article 30 which remain unpaid.

²¹⁹"That the Vista Irrigation District agrees to fulfill its obligations to the Pala Indian Reservation pursuant to section 6 of the June 28, 1922 contract between the United States and William G. Henshaw by drilling a well or wells upstream of the Pauma Narrows so that a flow of 6 cubic feet per second from said well or wells is delivered to the Pala Reservation. Provided, however, that if the Vista Irrigation District chooses to supply water to the Pala Indian Reservation from a source other than the San Luis Rey River, such arrangements may be negotiated between the Vista Irrigation District and the Pala Band of Mission Indians subject to the approval of the Secretary of the Interior."

construct facilities pursuant to the agreement of June 28, 1922, and to operate and maintain those wells and facilities, all at Vista's expense, to furnish the Pala Band "with the quantity of water for irrigation purposes to which they are entitled not exceeding a maximum of six cubic feet per second."

The agreement of June 28, 1922, describes that entitlement as "the first six second feet of water naturally flowing in said [San Luis Rey] river, at the point where it crosses the eastern boundary line of said Pala Indian Reservation. . . ." Since the San Luis Rey River ordinarily is dry or near dry during the summer months when irrigation water is needed, and since orchard crops in particular require a water supply which is reliable from year to year, Vista's obligation under the agreement of June 28, 1922, to bring the Henshaw-obstructed flow up to the level of the natural flow, appears to have little practicable value to the Pala Band. As do the others, the Pala Band needs a reliable supply of water; and since that supply must come from the ground in view of the terms and conditions of the power license issued herein, we find that a reliable supply can best be obtained by treating Vista's obligation to drill wells and construct facilities as one to provide the Pala Band with a minimum flow of water.

Furthermore, the natural flow of the San Luis Rey River at the eastern boundary of the Pala Indian Reservation has not been and cannot now be determined because it is obstructed by the Henshaw and diversion dams. Fragmentary historic data,²²⁰ however, suggest that prior to the construc-

²²⁰Official notice is taken of the pertinent portions of U.S. Geological Survey Water Supply Paper No. 300 which describes certain estimates and measurements of the flow of the San Luis Rey River in the vicinity of Pala, California, during the last decade of the 19th century and principally during the first decade of the 20th century.

tion of Henshaw Dam in 1922 there were summer flows in the vicinity of Pala, California, ranging up to three cubic feet per second (and occasionally above). Under such circumstances, we find that a minimum flow of three cubic feet per second is a reasonable requirement. In other words, whenever the flow controlled by the Henshaw Dam and the diversion dam would fall below three cubic feet per second at the eastern boundary of the Pala Indian Reservation, Vista would be obligated under Article 34 of the power license issued herein to pump sufficient groundwater so that the Pala Band would be assured of a continuous supply of three cubic feet per second.

Section 10(i) Waivers

Mutual and Escondido request the Commission to waive, pursuant to its discretionary authority conferred by Section 10(i) of the Federal Power Act, certain terms and conditions which are contained in Part I of that Act and which are routinely waived as to "minor" projects in the absence of special circumstances. All such terms and conditions are being waived, except the following for the reasons indicated:

Mutual requests waiver of Section 4(b), except the second sentence, which requires the submission of information pertaining to the "actual legitimate original cost of and the net investment in" licensed projects. Mutual also requests waiver of Section 14 which provides an acquisition price formula in the event of takeover, except insofar as the power of condemnation is reserved.

Sections 4(b) and 14 will not be applicable to Project No. 176 if the Act of August 15, 1953, is or becomes applicable. That act applies, according to its terms, to "any project owned by a State or municipality". Since the power license herein is being issued to Escondido and Vista, which are municipalities, but also to Mutual, which is not a municipi-

pality, we need not decide whether the Act of August 15, 1953, is currently applicable to Project No. 176 as a whole. Our interpretation of the Act of August 15, 1953, under FEDERAL TAKEOVER NOT RECOMMENDED suggests that when there are joint licensees, and one or more of them is a State or municipality and one or more is neither a State nor municipality, the Act of August 15, 1953, is applicable to the interests in project works owned by States and municipalities. In any event, we choose under such circumstances not to waive Sections 4(b) and 14, realizing that the issue will become moot if Mutual's existence is terminated as contemplated.

While Mutual and Escondido also request waiver of Section 15, we think that that provision is so closely connected to Section 14 that it should not be waived in this instance, particularly since annual licenses under Section 15(a) may be required after the expiration of the power license issued herein. And while they request waiver of the notice requirement of Section 4(e), the water supply problem underlying the regrettable length of this Opinion and order suggests strongly that there will be persons who will be interested in receiving notice of the next application for a license for Project No. 176, even though it is a "minor" project.

Lastly, we choose not to waive Section 22, as requested by Mutual and Escondido, because the agreement of February 2, 1914, provides for the sale of power generated by the Rincon power plant to the Rincon Band for an indefinite period of time, which period has extended beyond the termination date of Mutual's 1924 license and will extend beyond the termination date of the power license issued herein. Since the validity of that agreement, among others, is being challenged in the pending litigation involving the

water rights incident to Project No. 176, we are refraining from waiving Section 22 so that we may pass upon that agreement, if necessary, at a later time.

TERMS OF THE TRANSMISSION LINE LICENSE

The principal function of SDG&E's Project No. 559 transmission line is to transmit power from the Rincon powerhouse of Project No. 176 to SDG&E's Rincon Substation on the northern boundary of the Rincon Indian Reservation, at which point it interconnects with SDG&E's distribution system. The secondary function of that 12kV line is to transmit power from SDG&E's Rincon Substation when the Rincon powerhouse is not operating, for the Rincon Band under the agreement of February 2, 1914, as well as Project No. 176. In view of its principal function and the fact that there is no other line to transmit power from the Rincon powerhouse, we find that it is a "primary" transmission line within the purview of Section 3(11) of the Federal Power Act and, consequently, that it should be licensed in connection with the complete unit of development comprising Project No. 176.

Since Project No. 559 serves Project No. 176, the new license is being issued subject to the possible mandatory stay of the effective date of the license for Project No. 176 as provided in Section 14(b) of the Federal Power Act and § 16.10 of the Commission's regulations thereunder. Furthermore, its termination date is being adjusted to coincide with the termination date of the license which is being issued concurrently for Project No. 176. While SDG&E has not asked for waiver of terms and conditions which are contained in Part I of the Federal Power Act pursuant to the Commission's discretionary authority conferred by Section 10(i), the same terms and conditions are being waived with respect to both licenses.

Although the transmission line license issued herein involves the use of tribal lands embraced within the Rincon Indian Reservation, no party is contending that that license will interfere or be inconsistent with the purpose for which that reservation was created. Indeed, the line brings electric power to the Rincon Indian Reservation to satisfy Mutual's obligation under the agreement of February 2, 1914, to have power "constantly available whenever required for pumping water". Furthermore, as discussed under LICENSING ISSUES— First Proviso of Section 4(e)—(Interior's Conditions), Interior's Condition 10 would require SDG&E to permit reasonable agricultural and other use of its licensed right-of-way. Article 16 of the transmission line license issued herein allows the Rincon Band to use, occupy and enjoy any part of that right-of-way to the extent that it is not physically occupied by project works so long as there is no interference or inconsistency with SDG&E's use, occupancy and enjoyment thereof under the license, including obstruction of SDG&E's access to project works.

Considering the secondary function of the Project No. 559 transmission line, and the joint use of the right-of-way occupied by it and suitable safeguards against hazards as provided in Article 6 of the transmission line license issued herein, we find that the license as conditioned will not interfere or be inconsistent with the purpose for which the Rincon Indian Reservation was created. We find, additionally, that the transmission line project is best adapted to a comprehensive plan for improving or developing the San Luis Rey River and Escondido Creek waterways for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes.

SDG&E's 1925 license, as amended in 1928, prescribes an annual charge of \$13, or about \$5 per mile²²¹ for the use, occupancy and enjoyment of the tribal lands embraced within the Rincon Indian Reservation. The presiding judge, on the other hand, would not have fixed an annual charge because Mutual sells Rincon power to SDG&E at SDG&E's commuted cost of producing an equal amount of thermal power, rationalizing that the added rental would impose an "undue burden" on SDG&E's customers. And a staff witness would fix an annual charge of \$928.84 by determining the ratio of Project No. 559 acreage to Project No. 176 acreage, and applying that ratio to the total net benefits of Project No. 176. We reject the presiding judge's approach because Section 10(i) of the Federal Power Act precludes waiver of "annual charges for use of lands within Indian reservations." And we reject the staff witness's approach because annual charges for the use, occupancy and enjoyment of tribal lands by Project No. 176 are not fixed on the basis of the total net benefits of that project, but on the basis of the net water benefits and the net Rincon power benefits.

The 12 kV Project No. 559 transmission line is reasonably comparable in servitude to the communication and other service lines of Project No. 176 for which annual charges are fixed pursuant to the Commission's regulations for recompensing the United States for the use, occupancy and enjoyment of lands other than tribal lands embraced within Indian reservations. Accordingly, and in the absence of acceptable record testimony with respect to a reasonable annual charge therefor, we find that a reasonable annual charge for the Project No. 559 transmission line can be

²²¹On the basis of the Consumer Price Index, which is officially noted, current price levels are about 4 times those in the latter 1920's. Accordingly, the \$5 per mile in 1928 would translate to about \$20 per mile currently.

determined in accordance with the foregoing regulations of the Commission, and Article 17 of the transmission line license issued herein so provides. On the basis of a 40-foot wide²²² and 12,802-foot long right-of-way (11.76 acres) and the maximum interest rate which is applicable to 1979 (6-7/8%), the annual charge for the use, occupancy and enjoyment of the tribal lands of the Rincon Indian Reservation by the Project No. 559 transmission line would be \$60.64 for 1979, or about \$25 per mile.

COMPLIANCE ISSUES

Many of the issues raised by Interior's Complaint filed September 25, 1970, either have been subsumed within the larger relicensing/takeover controversy, or have become moot through the lapse of time or, in one instance, will become moot upon the replacement of approximately 12,000 feet of conduit which allegedly divides the eastern portion of the San Pasqual Indian Reservation. All issues pertaining to the possible revocation of Mutual's 1924 license for Project No. 176 have become moot as a result of the expiration of that license and the issuance herein of a new power license, and all issues pertaining to the disposition of San Luis Rey water will be resolved upon the effectiveness of that license. The remaining compliance issues pertain to compensation for (1) alleged violations of Mutual's 1924 license and/or the Federal Water Power and Federal Power Acts, and (2) the past use, occupancy and enjoyment of the La Jolla, Rincon and San Pasqual Indian Reservations.

No Compensation Back to 1924

The Bands and Interior argue at great length that through the years Mutual and Vista (and Vista's predecessor) committed numerous violations of Mutual's 1924 license for

²²²See 18 CFR § 11.21: 11.76 acres x \$150 per acre x .06875 x .5 = \$60.64. Because the Project No. 176 communication and other service lines occupy 20-foot wide rights-of-way, the effective rate for those lines would be \$12.50 per mile for 1979.

Project No. 176 and/or the Federal Water Power and Federal Power Acts. They contend that the license authorizes the conveyance of Mutual's natural flow water through the Escondido Canal and, conversely, that it does not authorize the conveyance of any Henshaw-impounded water, including pumped water, or the joint use and control of the licensed project works by Vista.

Licenses issued under the Federal Water Power Act and the Federal Power Act ordinarily are expressed in different terms. Typical of such licenses, the principal operative words of Mutual's 1924 license are:

"[T]he Commission hereby issues this license to the Licensee for the purpose of constructing, operating and maintaining upon the lands of the United States hereinafter designated and described, certain project works necessary or convenient for the development, transmission and utilization of power and constituting a part of the project hereinafter described. . . ."

Mutual's 1924 license does not refer to any of the works of the Henshaw development as being among the "project works . . . hereinafter described". Furthermore, it describes the "project covered by and subject to this license" as including water rights described in two exhibits, one of which is dated January 19, 1924, after Henshaw Dam was constructed, but the exhibits do not refer to the Henshaw appropriations of San Luis Rey water.²²³ Accordingly, we

²²³ Although Mutual's application for a license as amended in 1924 mentions the increase in the capacity of the Escondido Canal to 70 cfs and the fact that it would carry water of San Diego County Water Company, it contains nothing to indicate that the historic diversions shown in Mutual's 1921 application (about 3,700 acre-feet annually) would be increased materially or that San Diego County Water Company (and later Vista) would become Mutual's partner-in-fact in Project No. 176. Since a copy of the agreement of November 10, 1922, was not furnished to the Commission until the license was prepared and tendered in 1924, and since the terms of the license were not thereafter altered prior to its acceptance, we find that the license does not contemplate the use of Project No. 176 to convey approximately 8,286 acre-feet of Henshaw-appropriated water annually.

agree with the substance of the Bands' and Interior's contention that Mutual's 1924 license (including subsequent amendments) covers only Mutual's natural flow water.²²⁴

Although O.C. Merrill, Executive Secretary of the Federal Power Commission, said that the agreement of November 10, 1922, "indicates" that Mutual retained sufficient control of Project No. 176 to comply with the then proposed license, he did not indicate whether Vista's predecessor obtained sufficient control to have been required to join Mutual as a licensee. For the reasons indicated under JURISDICTION — Vista Irrigation District, and the fact that the license recites that "Escondido Mutual Water Company" is "the Licensee", the Bands and Interior are correct in the substance of their position that Mutual's 1924 license does not contemplate Vista's operation and control of Project No. 176 jointly with Mutual.

The Bands and Interior contend, additionally, that since the Escondido Canal has been used to convey additional and unauthorized waters and has been under the unauthorized partial control of Vista, and since Mutual and Vista have benefitted from such unauthorized use and control, the La Jolla, Rincon and San Pasqual Bands should be com-

²²⁴The "full understanding of the . . . project" conveyed by the maps, plans and specifications which were filed pursuant to Section 9(a) of the Federal Water Power Act and which were approved as part of the license, was that project No. 176 involved a diversion of the natural flow of the San Luis Rey River, as distinguished from a diversion of a dam-controlled flow. When Henshaw Dam was under construction in 1922 the U.S. Geological Survey advised the Federal Power Commission to defer consideration of Mutual's application for a license pending the filing of another application by Vista's predecessor (Henshaw). The Commission did not do so and, in addition, apparently failed to realize when furnished with a copy of the agreement of November 10, 1922, that the "full understanding of the . . . project" conveyed by the Section 9(a) exhibits was inconsistent with the arrangements within that agreement and, consequently, that Project No. 176 would not be operated as a run-of-the-river project, at least to the Wohlford development.

pensated back to 1924 for such additional and unauthorized use of their tribal lands. They rely, in this connection, on *The Montana Power Company*, 22 FPC 502 (1959), affirmed by *Montana I*, *supra*, wherein the Commission said at page 516,

“[W]hile the Indian Tribes have contributed nothing in addition to what they have already provided and the increase in capacity of Project No. 5 has been due entirely to elements other than those contributed by the Indians, the provisions of the license require that if Unit No. 3 is to be operated, the Indian Tribes are entitled to additional compensation.”

Further, the Bands and Interior call attention to the fact that Section 10(e) of both the Federal Water Power Act and the Federal Power Act mandates that the Commission “shall” fix reasonable annual charges for the use of tribal lands. And they contend that when the Commission fails to carry out that mandate it can and should fix annual charges retroactively to the date of issuance of a license.²²⁵

Although the Bands and Interior characterize the three Bands’ claims for compensation back to 1924 as claims for “annual charges”, we find upon analysis that they are basing their claims on two grounds. They are asking for back annual charges to the extent that their tribal lands were used as contemplated by the license. But they are also asking for damages to the extent that their tribal lands were used in a manner which was different from, or in addition to, the uses

²²⁵They say, “We are *not* claiming that the Commission, having once fixed annual charges, could subsequently and retroactively determine that they were inadequate.”

contemplated by the license.²²⁶

If the three Bands are entitled to compensation for the use of their tribal lands other than as contemplated by Mutual's 1924 license, their remedy is an action in court for damages. Commissioner Morgan said, in this connection, in his concurring opinion in *Idaho Power Company, Project No. 1971*, 22 FPC 572 (1963),

"I wish to make it unequivocally clear that we hereby dismiss the . . . complaint for the specific and technical reason — and only for the specific and technical reason — that this Federal Power Commission has no authority to adjudicate claims for money damages."

Insofar as the three Bands seek past annual charges for the use of their tribal lands as contemplated by the license, as distinguished from damages for the use of their lands other than as so contemplated, we have concluded that the Commission should not fix or readjust annual charges for any period of time prior to the date following the one on which it is asked formally to fix charges for the first time or to readjust charges which previously have been fixed.²²⁷

²²⁶Section 10(c) of the Federal Power Act provides, in pertinent part, "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefore."

See *Seaboard Air Line Railroad Company v. County of Crisp*, 280 F.2d 873 (CA5, 1960), cert. denied, 364 U.S. 942 (1961), and the explanation of that decision in *Beaunit Corp. v. Alabama Power Company*, 370 F.Supp. 1044 (N.D. Ala., 1973).

²²⁷Although it is true that the Commission readjusted annual charges for Montana Power Company's Project No. 5 as of the first day after the twenty-year period specified by Section 10(e) as precluding readjustments, that day happened to coincide with the day following the one on which the Commission was formally asked for readjustment. *Montana III*, *supra*, 459 F.2d, Footnote 6, at page 866. On the other hand, it is appropriate to readjust as of that date, as distinguished from the later date of a decision on the readjustment, to avoid placing a premium on delay and dilatory tactics. *Montana III*, *supra*, 459 F.2d, at 868. But see Judge Leventhal's concurring/dissenting opinion at 877.

Although the Federal Power Commission found in 1924 that Mutual's "license will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired," that finding pertained to the operation of Project No. 176 only as contemplated by the license. If Mutual and/or Vista (or Vista's predecessor) had come to the Commission to amend the license, or to obtain another license, the Commission would have had an occasion to consider new conditions and annual charges and, of importance to the three Bands, whether there would be any interference or inconsistency with their reservations. Mutual and/or Vista would have been informed of the cost to them (in terms of annual charges) of the amended "full understanding of the . . . project." But they did not come to the Commission and, as a result, the Commission should not now speculate as to what conditions and annual charges might have been imposed in connection with a license which presumably would have authorized the activities which in fact took place in connection with Project No. 176.

Any attempt in 1979 to fix annual charges in an amount which would have been reasonable in 1924²²⁸ would be fraught with factual and legal difficulties. Assuming, for example, that the Escondido Canal was the most profitable purpose for which the tribal lands occupied by it were suitable, and assuming further that the profit would be measured by the cost of obtaining equivalent volumes of water from the least expensive alternative source, it would appear to be most difficult if not impossible to establish such a cost for the period in which the Escondido Canal was the only major source of water for the Escondido area. Furthermore, it is

²²⁸"The charges were not fixed as of 1967 and made retroactive to 1959. They were fixed in 1967 as the amounts which were reasonable in 1959." *Montana III*, *supra*, 459 F.2d, at 869.

implicit in any decision to readjust annual charges that the original charges had become unreasonable. *Montana III*, *supra*, 459 F.2d, at 867. If the Commission were to fix annual charges as of 1924, would it be appropriate to leave them in effect through the termination date of the license, even though they would become unreasonable prior to that date? Or should they be readjusted as of one or more interim dates and, if so, when?

Although we recognize that courts would encounter the same factual and legal difficulties, nonetheless, we believe that they would provide better forums to redress intertwined claims for past²²⁹ annual charges for the use, occupancy and enjoyment of tribal lands embraced within Indian reservations, and for damages for the use of those lands other than as contemplated by the licenses in question.

Annual Charges to Begin as of 1969

Although Interior asked in its Complaint filed September 25, 1970, for a "readjustment of the charges for the entire period of use," that was not the first time the Commission was asked formally to fix or readjust annual charges for the La Jolla, Rincon and San Pasqual Indian Reservations. The La Jolla and Rincon Bands petitioned the Commission on September 22, 1969, to be allowed to intervene in Mutual's and Escondido's license transfer proceeding, and asked the Commission, among other matters, "for an order requiring readjustment of annual charges." And the San Pasqual Band filed a similar petition on May 25 1970, asking, among other matters, "[f]or an order requiring annual charges to be paid".²³⁰ Shortly thereafter, Mutual and Escondido filed

²²⁹Periods prior to the time the Commission is formally asked to fix annual charges.

²³⁰The requests for readjustment or payment of annual charges were independent of the petitions to intervene and, therefore, are treated herein as separate petitions.

a motion for withdrawal of their application to transfer the license; later, Mutual filed an application for a new license; and even later, Escondido joined in that application.

Since the issuance of the power license herein to Escondido as a joint licensee with Mutual and Vista will accomplish substantially what was attempted by the application to transfer the license, it is equitable that Mutual accept the liabilities which are associated with the benefits of its action. Accordingly, annual charges for the use of the La Jolla and Rincon Indian Reservations will be fixed for the period which commenced September 23, 1969, and annual charges for the use of the San Pasqual Indian Reservation will be readjusted for the period which commenced May 26, 1970. As a result, Mutual will be obligated to pay annual charges from the times of the formal requests in the license transfer proceeding.

In this connection, we reject Mutual's, Escondido's and Vista's contention that the Commission can readjust annual charges only as of the twentieth, thirtieth and fortieth anniversaries after a project is available for service, and that the Commission cannot fix or readjust such charges in this instance because no request had been made as of the fortieth anniversary (June 25, 1964). The "rigidity of the 20 and 10 year periods," of which the Court spoke in *Montana III*, *supra*, 459 F.2d, at 869, referred to the fact that annual charges which are fixed in connection with the issuance of a license are applicable to no less than the first twenty years of service, and annual charges which are readjusted at a later time are applicable to no less than a ten year period, subject, of course, to termination of the license. Section 10(e) states in this connection, that annual charges may be readjusted "at periods of *not less than* ten years thereafter"

(emphasis added), referring to the initial readjustment at the end of twenty years. Clearly, if annual charges can be readjusted at periods of not less than ten years, they can be readjusted at periods of more than ten years and, consequently, as of dates other than anniversary dates of a project's availability for service.

Similarly, we reject their contention captioned, "The Commission Has No Jurisdiction to Readjust the Annual Charges In Annual Licenses." Section 15(a) authorizes the Commission to issue a new license if the United States does not take over a project "at the expiration of the original license", and then goes on to say that if the Commission doesn't issue a new license it shall issue annual licenses "under the terms and conditions of the original license". We construe the term "original" as so used, as distinguishing the expiring license from a "new" license which the Commission is authorized to issue, and not as referring to the terms imposed by the expiring license when it was originally issued. Accordingly, an annual license is issued under the terms and conditions of the expiring license as amended as of the time of its expiration. Our action herein amends Article 19 of Mutual's 1924 license as of September 23, 1969, with respect to the use of the La Jolla and Rincon Indian Reservations, and May 26, 1970, with respect to the use of the San Pasqual Indian Reservation. Accordingly, annual licenses embodying Article 19 as so amended prior to the expiration of Mutual's 1924 license, are issued in compliance with Section 15(a).

Fixing/Readjustment of Annual Charges

It is necessary to amend Mutual's 1924 license for Project No. 176 in order to fix annual charges for the use of the La Jolla and Rincon Indian Reservations and to readjust annual charges for the use of the San Pasqual Indian Res-

ervation. Although Mutual has no application pending with respect to that license which can be acted upon and conditioned by the Commission to fix and readjust annual charges, and although Section 6 of the Federal Water Power Act provided that "[l]icenses . . . may be altered . . . only upon mutual agreement between the licensee and the commission," nonetheless, *the Commission has authority to amend a license without the consent of the licensee to fix or readjust annual charges.*

Section 6 of the Federal Water Power Act also provided, "Each . . . license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act"; Mutual's 1924 license was so conditioned, and Mutual accepted the terms and conditions of the Federal Water Power Act. Among those conditions was the one in Section 10(e) which directed the Commission to fix reasonable annual charges for the use of Indian reservations, and which permitted readjustments of those charges. Accordingly, Mutual thereby agreed to pay such reasonable annual charges as might be fixed or readjusted by the Commission. If, on the other hand, Mutual could avoid payment of such annual charges ordered under an open-ended license condition such as Section 10(e) simply by refusing to agree to a license amendment to that effect, the Commission's authority under Section 10(e) would be vitiated.

Section 6 must be read in conjunction with Section 10(e). An alteration or amendment of a license ordinarily requires the licensee's consent to give the licensee an opportunity to consider whether the prospective amendment is consistent with the integrity of the license. Annual charges, on the other hand, are subject to readjustment from time to time so that their reasonableness can be assured throughout the term of the license. Upon consideration of the purposes of the two provisions, we have concluded that an amendment

which assures the reasonableness of annual charges would not impair the integrity of the license and, consequently, that a license can be amended to carry out the purpose of the readjustment provision of Section 10(e) without conflicting with the purpose of the consent requirement of Section 6.²³¹

The parties have generally failed in their approaches to fixing and readjusting annual charges under Mutual's 1924 license for Project No. 176 because *annual charges for the use of tribal lands can be fixed or readjusted only for the use, occupancy and enjoyment of those lands contemplated by the license*. It was appropriate for the parties to consider the Henshaw facilities and the water associated with their operation in their approaches to annual charges under the power license issued herein because that license includes the Henshaw facilities. But, as we have indicated, Mutual's 1924 license was generally limited to the Escondido Canal, the Wohlford development and the water appropriated by Mutual's predecessor. And, as a result, the ongoing benefits derived by Mutual and Vista from Henshaw-appropriated water are not within the contemplation of Mutual's 1924 license. While any damages the Bands may have incurred in Mutual's and Vista's realization of those benefits may be compensable under Section 10(c), or otherwise, the realization of those benefits is not compensable through the

²³¹No form acknowledging acceptance of the amendment to Article 19 of Mutual's 1924 license for Project No. 176 is appended to this Opinion and order, as in the case of the two licenses which are issued herein. If Mutual does not file an application for rehearing pursuant to Section 313(a) of the Federal Power Act asserting that we erred, it will in fact have consented to it. The situation is analogous to the claim of an Indian/Interior veto power over annual charges which is discussed under LICENSING ISSUES — Section 10(e), as to which the District of Columbia Circuit said in *Montana III*, *supra*, 459 F.2d, at page 874, "As is the situation with the Tribes, the Secretary can participate as a party and avail of the provisions for judicial review."

payment of annual charges. The parties' approaches generally intertwine annual charges with damages and are rejected because the Commission has no authority to adjudicate claims for money damages.

In the absence of an acceptable approach of the parties, Article 30 of the power license issued herein has been adapted to Article 19 of Mutual's 1924 license for Project No. 176.

The definitions in Article 19 of the terms "Cost of Canal Water" and "Cost of Alternative Water" (1) accept the 1912 quantification of Mutual's natural flow entitlement as being 4,143 acre-feet per year, and (2) assume that the three Bands are to receive compensation under the license based on that amount of water each year.²³² The definition of "Cost of Canal Water" accepts the fact that Project No. 176 and the Henshaw development have been operated as a single unit of development by including fractional parts of the costs of operating both, but it differs from its Article 30 counterpart in that it gives effect only to the fractional part of the aggregate operating costs which Mutual's natural flow entitlement (4,143 acre-feet) bears to the number of acre-feet leaving the Escondido Canal for the year. The definition of "Cost of Alternative Water", on the other hand, considers only Mutual's replacement costs and the replacement of only 4,143 acre-feet.

Since the "Net Water Benefit" is thereby designed to reflect Mutual's natural flow entitlement and to exclude

²³² There is no need to reduce that compensation for the amounts of water released to the Rincon Band. A copy of the agreement of November 10, 1922, in which Mutual agreed to satisfy the Rincon Band's natural flow entitlement from its own natural flow entitlement, was not furnished to the Commission until the license was prepared and tendered in 1924 and therefore, Mutual's agreement to satisfy the Rincon Band's entitlement from its own is not within the contemplation of the license. Accordingly, there is no need to consider Gross Canal Water or Gross Water Benefits under Mutual's 1924 license as amended herein.

Henshaw-impounded water, 50% of the Net Water Benefit is allocated to Mutual as the Licensee and owner of the improvements, and the other 50% is allocated among the beneficial owners of the lands (including Mutual, Vista and the three Bands) occupied by the Escondido Canal and the Wohlford development. As shown in Appendix B, such a 50/50 division corresponds to the unshaded portion of the allocation arrow.

The 50% of the Net Water Benefit is allocated among the beneficial owners of the lands occupied by the Escondido Canal and the Wohlford development in the same manner as under the power license issued herein. However, there is no need to consider adjustments for releases of water in crediting annual charges to the respective Bands. The determination and allocation of the "Net Rincon Power Benefit" is also the same as under the power license issued herein.²³³

Reasonableness of Annual Charges

Although the amounts of annual charges to be paid for past and future periods will be determined from submitted data by the Director, Division of Licensed Projects, or his Deputy, in accordance with Article 30 of the power license issued herein and Article 19 of Mutual's 1924 license as amended herein, the reasonableness of the charges resulting from the application of the formulae will be illustrated through 5-year averages of fiscal 1970-75 data, which are the most recent periods for which data are furnished in the record.

²³³The \$8.00 per mile readjustment for the 100-foot wide right-of-way for the former Rincon-Bear Valley transmission line is the amount formerly provided by 18 CFR § 11.21 for the use of lands of the United States for transmission lines only. The Commission, in its orders issued herein on July 14 and August 26, 1977, authorized the abandonment of that right-of-way and the termination of annual charges applicable thereto on the date of restoration of the lands.

Turning first to the water benefits of Project No. 176, it is assumed that the 5-year averages will represent a typical year under the power license issued herein. During that typical year Mutual will receive 6,114 acre-feet of water through the Escondido Canal (Exhibit B-143) at a cost of \$15.00 per acre-foot (Exhibit M-72), or a total of \$91,710; and Vista will receive 4,750 acre-feet (Exhibit B-143) at a cost of \$26.31 per acre-foot (Exhibit B-135), or a total of \$124,973. Together, they will receive 10,864 acre-feet of water at an aggregate cost of \$216,683.

MWD charged \$59.25 per acre-foot for domestic water in 1975-76 and \$26.25 per acre-foot for agricultural water.²³⁴ During that typical year Mutual's consumption ratio will be 57.2% domestic and 42.8% agricultural (Exhibit B-144), resulting in a weighted average cost of \$45.13 per acre-foot based on MWD's 1975-76 prices. Similarly, Vista's consumption ratio will be 59.0% domestic and 41.0% agricultural (Exhibit B-145), resulting in a weighted average cost of \$45.72 per acre-foot based on the same prices. Accordingly, Mutual will pay \$275,925 for 6,114 acre-feet, Vista will pay \$217,170 for 4,750 acre-feet and together they will pay \$493,095 for 10,864 acre-feet of water.

The difference between the \$493,095 which Mutual and Vista will pay for MWD water and their aggregate \$216,683 cost for San Luis Rey water, represents a Net Water Benefit of \$276,412.²³⁵ Of that amount, \$69,104, or 25%, will be

²³⁴Subject to certain surcharges.

²³⁵As indicated earlier, the Escondido Canal conveys an average of about 14,600 acre-feet per year consisting of 4,100 acre-feet representing Mutual's appropriation of the San Luis Rey River, 2,700 acre-feet representing Mutual's purchases of Henshaw-stored water from Vista, and 7,800 acre-feet representing Vista's appropriation of the San Luis Rey River. On the basis of different figures principally involving volumes which are closer to the foregoing, the Bands' witness Stetson utilized the sharing of the net benefits approach to derive a net water benefit of \$398,800. Since the cost of both San Luis Rey and MWD water obviously will change over time, the question of whether the differential in costs is \$398,800 or only \$276,412 is not as important as (1) noting from those figures the probable level of that differential during the early years under the new power license and (2) noting the allocation of that differential among the interested parties to determine

allocated to the Licensees (Mutual, Escondido and Vista) as the owners of the lands underlying and the improvements comprising the Henshaw development. Of the \$276,412, another \$103,654, or 37.5%, will be allocated to the Licensees as the owners of the improvements comprising the Escondido Canal and the Wohlford development. And the remaining \$103,654, or 37.5%, will be allocated among the beneficial owners of the lands underlying the Escondido Canal and the Wohlford development. Of that amount, \$54,449, or 52.53%, would be allocated to the United States as the annual charge for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations. And \$25,675, or 24.77%, would be allocated to the three Bands as the total annual charge for the use, occupancy and enjoyment of their tribal lands.

During that illustrative typical year, 1,427 acre-feet of water will be released to the Rincon Band (Exhibit B-143).²³⁶ If the water is not released, Mutual will receive 6,917 (6,114 + 803) acre-feet²³⁷ at a total cost of \$91,710²³⁸, and Vista will receive 5,374 (4,750 + 624) acre-feet at a total cost of \$124,973. Together, they will receive 12,291 acre-feet at an aggregate cost of \$216,683. Mutual will pay \$312,164 for 6,917 acre-feet of MWD water, Vista will pay \$245,699 for 5,374 acre-feet and together they will pay \$557,863 for

²³⁶The releases will be less than 12% of the Gross Canal Water and, consequently, there will be no reimbursement of the Cost of Canal Water under Article 31.

²³⁷Diversions of water from the Escondido Canal to the three Bands will be allocated ratably among the Licensees in computing the Gross Water Benefit. Since Mutual will receive 6,114 acre-feet representing 56.28% of the total of 10,864 acre-feet, 56.28% of the 1,427 acre-feet released to the Rincon Band, or 803 acre-feet of water, will be allocated to Mutual. Similarly, 43.72% or 624 acre-feet, will be allocated to Vista.

²³⁸The total cost will not go up if the water is not released; the cost per acre-foot will go down.

12,291 acre-feet. The difference between the cost of MWD water and the cost of San Luis Rey water will be \$341,180, which is the Gross Water Benefit without diversions of water to the Rincon Band.

37.5% of the Gross Water Benefit of \$341,180, or \$127,943, will be allocated among the beneficial owners of the lands underlying the Escondido Canal and the Wohlford development. Of that amount, 24.77% or \$31,691, will be allocated to the three Bands. Tentatively, \$9,849, or 31.08% of the \$31,691, would be allocated to the La Jolla Band; \$6,440, or 20.32%, to the Rincon Band; and \$15,402, or 48.60%, to the San Pasqual Band.

The difference between the aggregate tentative credits of \$31,691 and the annual charge of \$25,675, or \$6,016, will be allocated to the three Bands ratably according to the respective volumes of water diverted to their tribal lands. In the illustrative typical year, the entire \$6,016 will be deducted from the tentative credit of the Rincon Band since it will be the only one to receive water from the Escondido Canal. Accordingly, annual charges of \$9,849 will be credited to the La Jolla Band; \$424, to the Rincon Band; and \$15,402 to the San Pasqual Band.

If the illustrative typical year had been one under Mutual's 1924 license as amended herein, Mutual would have received its entitlement of 4,143 acre-feet of water at a cost of \$19.95 per acre-foot,²³⁹ or a total of \$82,653. And Mutual would have paid \$45.13 per acre-foot, or \$186,974, for an equal volume of MWD water. The difference, or Net Water Benefit, would have been \$104,321. 50% of the Net Water Benefit, or \$52,161, would have been allocated among the

²³⁹As illustrated, the Cost of Canal Water under Article 30 of the power license issued herein will be \$216,683 for 10,864 acre-feet, or \$19.95 per acre-foot.

beneficial owners of the lands underlying the Escondido Canal and the Wohlford development. Of that amount, 52.53%, or \$27,400 would have been allocated to the United States as the annual charge for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations. And 24.77%, or \$12,920, would have been allocated to the three Bands as the total annual charge for the use, occupancy and enjoyment of their tribal lands. Annual charges of \$4,016, or 31.08%, would have been credited to the La Jolla Band; \$2,625, or 20.32% to the Rincon Band; and \$6,279, or 48.60%, to the San Pasqual Band.

Turning to the Net Rincon Power Benefit of Project No. 176, again it is assumed that the 5-year averages (all of which are derived from Exhibit B-147) represent a typical year under the power license issued herein as well as Mutual's 1924 license as amended herein. During that typical year, as shown in the accompanying computation, Rincon Power Revenues of \$15,131 would be derived from the sale of 653,925 kilowatt-hours of electricity generated by the Rincon power plant and the resale of an additional 293,075 kilowatt-hours purchased from SDG&E. The Cost of Rincon Power would be \$11,984, of which \$6,228 would be attributable to generating the 653,925 kilowatt-hours, and \$5,756 would be attributable to purchasing the additional 293,075 kilowatt-hours.²⁴⁰ The excess of the Rincon Power Revenues over the lower Cost of Rincon Power would be \$3,147, which is the Net Rincon Power Benefit. Accordingly, an annual charge of 50% of that amount, or \$1,574, would be credited to the Rincon Band.

²⁴⁰It should be observed that the loss from the purchase and resale of the 293,075 kilowatt-hours is reflected in the computation to reduce the Net Rincon Power Benefit.

COMPUTATION OF NET RINCON POWER BENEFIT

Revenues	Kilowatt- Hours	Cents Per Kilowatt- Hour	Total Revenues
<u>Generated Power</u>			
Sale to Rincon Band	109,645	0.125**	\$ 137
Sale to SDG&E	544,280	1.947	10,598
	653,925		\$10,735
<u>Purchased Power</u>			
Resale to Rincon Band	293,075*	1.500**	4,396
<u>Rincon Power Revenues</u>	<u>947,000</u>		<u>\$15,131</u>
Expenses	Kilowatt- Hours	Cents Per Kilowatt- Hour	Total Costs
Generating Costs	653,925	0.0095	\$ 6,228
Purchasing Costs	293,075*	1.964	5,756
<u>Cost of Rincon Power</u>	<u>947,000</u>		<u>\$11,984</u>

*Excludes 54,165 purchased kilowatt-hours not sold to the Rincon Band.

**Fixed under the agreement of February 2, 1914.

Ideally, amounts of annual charges for the use, occupancy and enjoyment of tribal lands should equal the amounts which would be fixed by willing Indian landowners and willing developers of water power in a free-bargaining environment. In view of the regulation imposed by the Federal Power Act, however, and particularly when constructed projects are sought to be licensed or relicensed, such an environment does not exist and, consequently, such ideal results are only a goal.

Mutual, Escondido and Vista have indicated that they "would agree that annual charges could be fixed at \$10,000." Although the Bands and Interior are not that explicit, it appears that they are seeking for the Bands annual charges which would approach as closely as possible the approximate \$400,000 attributed by their witnesses to the

water benefits and Rincon power benefits of Project No. 176. We think that \$10,000 is unreasonably low in view of the economic value of Project No. 176 (including the Henshaw development), and that the Bands are trying to exact an unreasonably large portion of those benefits. The formulae which are adopted herein should provide annual charges, as illustrated, more nearly representing the amounts which would be fixed in a free-bargaining environment and should, therefore, produce reasonable results.

Interest on Back Annual Charges

Although Mutual, Escondido and Vista oppose the payment of interest on annual charges applicable to past periods which are fixed or readjusted herein, the Bands, Interior and the Commission staff support the payment of interest at 7% per annum. We believe that Mutual should pay interest on the annual charges which are found herein to be fair and reasonable. Of course, in the case of annual charges applicable to the San Pasqual Indian Reservation, the interest will be on the difference between those actually paid and those which are found herein to be fair and reasonable.

The rate of interest should approximate the prevailing commercial rate of return. In refunds of excessive rates and charges under the Federal Power Act, that rate is currently fixed by 18 CFR § 35.19a at 7% per annum on excessive rates and charges collected prior to October 10, 1974, 9% per annum on accruals on and after that date applicable to collections prior to that date, and 9% per annum on excessive rates and charges collected on and after that date. Upon increasing the interest rate applicable to refunds from 7% to 9% in Order No. 513 issued October 10, 1974, the Commission explained that it "must reflect a variety of money market rates." Accordingly, that dual-rate approach is the Commission's latest pronouncement of the prevailing com-

mercial rate of return. We know of no reason why it should not be applied to the present situation and, therefore, a new paragraph (g) is being added to Article 19 of Mutual's 1924 license, as amended, to provide for interest at 7% per annum prior to October 10, 1974, and 9% per annum on and after that date, to the date(s) of payment.

Cease and Desist Order

As indicated in Footnote 72, a document entitled "Draft Environmental Impact Report of the Modification of Henshaw Dam and Warner Ranch Ground Water Program" dated May 1978, has been submitted on behalf of Vista to the Commission for comment. As discussed under JURISDICTION — The Henshaw Facilities and Water Rights, the facilities which are the subject of Vista's draft environmental report are being operated with the facilities of Project No. 176 as part of a single undertaking and must, therefore, be licensed under the Federal Power Act.

Mutual's 1924 license for Project No. 176 is subject to the terms and conditions of the Federal Water Power Act as in effect at the time of its issuance, including Section 10(b) which provided,

"That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alternation or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of a capacity in excess of one hundred horsepower without the prior approval of the commission. . . ."

Notwithstanding that provision and its embodiment in Article 4 of Mutual's 1924 license, Mutual and Vista's predecessor cooperated throughout the middle and late 1920's in enlarging, lining and otherwise altering the Escondido Canal and in constructing concrete diversion facilities to

replace the original diversion tunnel, all without obtaining the *prior* approval of the Commission. As late as 1948-49 the Escondido Canal was rerouted from Bear Valley Creek and through a 6,000-foot, 45-inch pipeline on the San Pasqual Indian Reservation, which was the occasion for the \$25 annual charge when the rerouting was ultimately approved in 1957.

The same statutory and license provisions continue to be applicable to Vista's actions during the periods of the annual licenses issued pursuant to Section 15(a). In view of the history of modifying Project No. 176 without obtaining the prior approval of the Commission, and the proposals which are contained in Vista's draft environmental report together with our position on licensing the affected facilities, Vista is precluded by Ordering Paragraph (E) of this Opinion and order from going forward with its proposals pertaining to Henshaw Dam and the Warner Ranch well field until they are considered and acted upon by the Commission.

The power license issued herein subjects Project No. 176 to the terms and conditions of the Federal Power Act (as distinguished from the Federal Water Power Act), including Section 10(b) which now applies to installed capacities in excess of 2,000 horsepower and, therefore, excludes Project No. 176. Nonetheless, Article 3 of Form L-16 (which is applicable to projects not exceeding 2,000 horsepower) contains essentially the same terms and conditions and, therefore, Ordering Paragraph (E) precludes Vista from going forward with its proposals after the power license is issued herein, as well as before.

Under all of the facts and circumstances, particularly with respect to the seriousness with which we view matters affecting the safety of dams, we believe that Ordering Paragraph (E) is in the public interest and an appropriate exercise of our authority under Sections 4(g) and 309 of the Federal Power Act, among other provisions.

Interim Operating Order

Although all issues pertaining to the disposition of San Luis Rey water will be resolved upon the issuance herein of a new power license for Project No. 176, the possibility remains that the effective date of that license may be stayed pursuant to Section 14(b) of the Federal Power Act²⁴¹ or a court order.

The Commission's finding that Mutual's 1924 license "will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired", was premised upon its "full understanding of the . . . project" conveyed by the Section 9(a) exhibits. That understanding, however, was inconsistent with the arrangements within the agreement of November 10, 1922, and, as a result, the affected tribal lands have been used in a manner which was different from, or in addition to, the uses contemplated by those exhibits. We have indicated, in this connection, that while Mutual's 1924 license does not authorize the conveyance of Henshaw-impounded water, including pumped water, or the joint use and control of the licensed project works by Vista, the affected tribal lands have been used to convey such water, and have been used in part to benefit Vista and have been subject to Vista's partial control.

We have also indicated that the adequacy of the Rincon Band's water supply has eroded during the term of Mutual's 1924 license, and that the combined authorized and unauthorized operation of Project No. 176 thereunder is interfering and inconsistent with the purpose of the Rincon Indian Reservation. We indicated, additionally, that Project No. 176 as so operated is impairing or interfering with the La

²⁴¹Such a stay would operate only with respect to the effective date of Ordering Paragraphs (B) and (C) hereof, issuing the two licenses.

Jolla water supply, although speculatively so, and that the interference or inconsistency with the purpose of the Rincon Indian Reservation is a classic case. In view thereof, Article 29 of the power license issued herein is designed to preclude any possible interference or inconsistency of that license with the purpose for which the La Jolla, Rincon and San Pasqual Indian Reservations were created.

Accordingly, any stay of the issuance of a new power license for Project No. 176 will prolong the existing interference or inconsistency by the combined authorized and unauthorized operation of Project No. 176 under Mutual's 1924 license, with the purpose for which the Rincon and arguably the La Jolla Indian Reservations were created, unless, of course, such a result is precluded by this Opinion and order.

The power license issued herein does not attempt to terminate the unauthorized use and control of Project No. 176 because it is not in the public interest to close the water gates of Escondido and Vista, in whole or in part, at least presently, before the three Bands have developed a present capability of using the water. Instead, the license regulates that use and control through Article 29, which conditions it in such a manner as not to interfere or be inconsistent with the purpose for which the three reservations were created. Accordingly, we find that it is appropriate, expedient and in the public interest to conserve and utilize the water power resources of the region by implementing Article 29 currently, through Ordering Paragraph (F), in the event of any stay of the effective date of the new power license for Project No. 176.

Ordering Paragraph (F) is based principally on the Commission's broad authority under Section 4(g) of the Federal Power Act "to issue such order as it may find appropriate, expedient and in the public interest to conserve and utilize

the . . . water power resources” of a region after having investigated the occupancy of the public lands and reservations used for the purpose of developing electric power. Section 4(g) was enacted in 1935 to

“enable the Commission to conduct its own investigations instead of waiting for matters to be brought formally to its notice, and to proceed directly to prevent violations, instead of having to call upon . . . the Attorney General to take action.”²⁴²

Ordering Paragraph (F) is not, and should not be construed as, an attempted unilateral amendment of Mutual's 1924 license. It is an exercise of the Commission's authority to remedy violations of the laws administered by it and licenses issued under those laws, in which the terms and conditions of such remedial action are expressed, conveniently, by directing Mutual and Vista to comply with Article 29 of the power license issued herein if the effective date of that license is stayed.

Ordering Paragraph (F) hopefully will terminate, or at least mitigate during the period of a stay, the continuing interference with the Rincon water supply. And it should enable the La Jolla, Rincon and San Pasqual Bands to advance the formulation of concrete plans, including financing commitments, for utilizing the water.

²⁴²Senate Report No. 621, 74th Congress, 1st Session, at page 43.

We could request the Attorney General pursuant to Section 26 to institute legal proceedings to remedy or correct the violations of the Federal Water Power and Federal Power Acts and Mutual's 1924 license which are found herein, and hopefully obtain a court order similar to Ordering Paragraph (F). But in view of the time needed for such litigation, and the fact that a stay pursuant to Section 14(b) will take effect, if at all, automatically within 30 days of the issuance of this Opinion and order (18 CFR § 16.10), Section 4(g) obviously provides a better vehicle for remedying the continuing unauthorized use and control of Project No. 176.

MISCELLANEOUS MATTERS

Preference Issue Not Reached

On June 30, 1977, PGandE, which is not a party to this proceeding and is not a "municipality" within the purview of Section 3(7) of the Federal Power Act, filed a motion for leave to file an *amicus curiae* brief on exceptions, together with its brief, stating in the motion that it holds 32 water power licenses under the Federal Power Act and that it is approached by others, including municipalities, from time to time, claiming preferences against PGandE in prospective relicensings. PGandE contends in its brief that certain statements in the initial decision pertaining to relicensing preferences should not be regarded as authoritative because a preference issue did not in fact arise in the initial decision. No answers to PGandE's motion have been filed.

In view of PGandE's status as a non-municipality and a multiple licensee, PGand E could be affected materially if an aspect of this Opinion and order were to turn on a relicensing preference, and, consequently, we find that good cause has been shown to permit the filing of its brief. But with respect to the preference issue raised in PGandE's brief, we said under LICENSING ISSUES, Sections 10(a) and 7(a).

"Having determined that the Bands are not 'municipalities' (see Footnote 105), we do not reach or decide the question of whether municipalities have a preference under Section 7(a) over a prior non-municipality licensee, such as Mutual."

Accordingly, that issue has not been reached in this Opinion and order.

No Oral Argument

On June 15, 1977, the Chief Administrative Law Judge waived the 50-page limitation specified by 18 CFR § 1.31(b)(2) as being applicable to briefs on and opposing

exceptions. On September 6, 1977, Mutual, Escondido and Vista, and the Bands and Interior, filed their briefs on exceptions together with separate motions for oral argument. Subsequently, the staff filed a reply to the motions conceding that the issues are both novel and complex, but opposing oral argument on the grounds that the record is long and the briefs are comprehensive.²⁴³

After considering the motions and the reply, as well as the briefs and the record, we are satisfied that the parties have been given a fair opportunity to address the issues and that the briefs in fact address them adequately. As a result, we find that oral argument would not accomplish any substantial purpose and, in our discretion, that the motions should be denied.

No Supplemental Brief

On December 14, 1977, just before the briefs opposing exceptions were filed herein, an administrative law judge issued an initial decision in *Northern States Power Company*, Project No. 108, which thereupon became the second contested relicensing proceeding to reach the Commission for decision. On January 9, 1978, the Bands filed a motion for leave to file a supplemental brief, together with a short supplemental brief discussing aspects of that initial decision, stating in the motion that they seek leave to file the brief "for the sole purpose of bringing the Commission's attention to this important new development." Subsequently,

²⁴³The Bands and Interior filed a joint brief on exceptions consisting of 263 pages of argument and 120 pages of appendices, and Interior filed a separate 14 page brief. Mutual, Escondido and Vista filed a 79 page joint brief on exceptions, and Vista filed a separate 5 page brief. The Commission staff, on the other hand, filed a 49 page brief on exceptions. On December 15 and 16, 1977, the parties filed briefs opposing exceptions aggregating 117 pages. All briefs are typed single-space.

Mutual, Escondido and Vista, and the staff, filed separate oppositions to the motion.

18 CFR § 1.31(a) provides for the filing of briefs on and opposing exceptions, and concludes, "No further response will be entertained unless the Commission, upon motion or its own initiative, so orders." The proper method for calling the Commission's attention to a decision which is issued in close proximity to the filing of briefs, or subsequently, is to file a motion to lodge together with a copy of the decision to be lodged. A copy of the decision may be omitted, however, pursuant to 18 CFR § 1.26(c)(3), if it is issued in another proceeding before the Commission. In any event, a motion to lodge should not address the merits either of the proceeding under consideration or the decision to be lodged.

Under the circumstances, the Bands' motion will be treated as one to lodge a copy of the initial decision in *Northern States Power Company*, Project No. 108, and will be granted to that extent. We find that good cause has not been shown for leave to file the supplemental brief and, consequently, that the Bands' motion should be denied to that extent.

Statement of Environmental Factors

A draft environmental impact statement was prepared by the Commission staff and, on September 13, 1974, made available to interested parties pursuant to the National Environmental Policy Act of 1969, the guidelines established by the Council On Environmental Quality and Sections 2.80 and 2.81 of the Commission's General Policy and Interpretations. Similarly, a final environmental impact statement was prepared by the Commission staff after receiving and considering comments on the draft statement, and, on September 17, 1975, made available to interested parties. The final environmental impact statement is designated as

Exhibit S-60, was considered by the presiding administrative law judge and the Commission in reaching their respective decisions, and is our detailed statement on the factors specified in Section 102(2)(C) of the National Environmental Policy Act of 1969.

The Commission orders:

(A) The Initial Decision of the presiding administrative law judge issued in this proceeding on June 1, 1977, is (1) reversed insofar as it dismisses the applications for new licenses for Project Nos. 176 and 559, and (2) affirmed insofar as it terminates the complaint proceeding in Docket No. E-7562 and the investigation in Docket No. E-7655.

(B) With respect to the license for Project No. 176, and subject to a possible mandatory stay as provided in Section 14(b) of the Federal Power Act (Act) and §16.10 of the Commission's regulations under the Act:

(B-1) This new license is issued jointly to Escondido Mutual Water Company; City of Escondido, California; and Vista Irrigation District (Licensees), pursuant to Part I of the Act, for a period effective the first day of the month in which this license is issued, and terminating June 24, 2004, for the continued operation and maintenance of Escondido Project No. 176 occupying lands of the United States, including portions of the La Jolla, Rincon and San Pasqual Indian Reservations, on the San Luis Rey River and Escondido Creek in San Diego County, California, subject to the terms and conditions of the Act, insofar as not expressly waived herein, which Act is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the Act.

(B-2) Project No. 176 consists of:

(i) All lands, the use and occupancy of which are necessary or appropriate for the purpose of the project, con-

stituting the project area and enclosed by the project boundary, which area and boundary are shown in and described by certain exhibits which form part of the application for license and are designated and described as:

<u>Exhibit</u>	<u>Sheet</u>	<u>FERC No.</u>	<u>Showing</u>
J	1	176-47	General Map of Project
K	1A	176-76	Project No. 176 (Key Map)
K	2	176-77	Topographic Map — Conduit Intake Works, Road through Cuca Rancho and La Jolla Indian Reservation

(ii) All project works including:

(1) A 16-foot high concrete diversion dam having a 112-foot long crest on the San Luis Rey River, with sluice gates, wood head gates, a concrete control box, a suspension bridge, a 5-foot parshall flume and an operator's cottage.

(2) A 13.5 mile long water conduit (Escondido Canal) capable of conveying a flow of 70 cfs and consisting of approximately 58,404 feet of gunite lined canal, 3,567 feet of tunnel, 670 feet of metal flume, 2,156 feet of inverted siphon (42-inch diameter) and 6,118 feet of pipeline (45-inch diameter).

(3) A reservoir (Lake Wohlford) with a storage capacity of 6,943 acre-feet and a surface area of 224.4 acres, including a 100-foot high hydraulic fill dam facing on a rock fill dam on Escondido Creek, a reinforced concrete siphon and spillway with a concrete weir extension, an outlet tower with 36-inch gate valves at three levels, and outlet works consisting of 3,412 feet of 42, 48 and 50-inch pipeline.

(4) A power plant (Bear Valley) including an 830-foot penstock (24-inch diameter), an 1,800 square foot concrete powerhouse and three generating units with a total capacity of 520 KW.

(5) A power plant (Rincon) including a 2,125-foot penstock (12, 16, 18 and 20-inch diameter), a 900 square foot concrete powerhouse, two generating units with a total capacity of 240 KW and an operator's cottage.

(6) A reservoir (Lake Henshaw) with a gross storage capacity of 194,323 acre-feet and a surface area of 5,875 acres, impounded by a 155-foot high hydraulic fill dam on the San Luis Rey River and two saddle dams; a concrete spillway; outlet works and water conduits consisting of an outlet structure, 755 feet of outlet tunnel, a 48-inch butterfly valve control gate, and 265 feet of inlet tunnel; and pumping facilities consisting of approximately 25 wells in the Warner groundwater basin and ditches and pipelines from those wells to the reservoir.

(7) Telephone lines, power lines, access roads, trails and other appurtenant facilities, the location, nature and character of which are more specifically shown and described by the exhibits cited above and by certain other exhibits which also form part of the application for license and are designated and described as:

<u>Exhibit</u>	<u>Sheet</u>	<u>FERC No.</u>	<u>Showing</u>
L	1	176-59	Diversion Dam, Structures, Sections of Intake Conduit
L	2	176-60	Rincon Power Plant and Penstock
L	3	176-61	Plan and Sections of Lake Wohlford Dam Spillway
K	3	176-78	Topographic Map — Pack Trails; Tunnels 1, 2, 3 and 4; Portion of Conduit and Telephone Line
K	4	176-79	Topographic Map — Tunnel 7, Portion of Conduit and Telephone Line
K	5	176-80	Topographic Map — Rincon Powerhouse and Penstock, Portion of Conduit and Telephone Line, Access Roads

<u>Exhibit</u>	<u>Sheet</u>	<u>FERC No.</u>	<u>Showing</u>
K	5A	176-81	Topographic Map — Access Roads to Rincon Powerhouse
K	6	176-82	Topographic Map — Portions of Conduit, Telephone Line, Access and Service Roads, Lower Hell-hole Siphon
K	7A	176-83	Topographic Map — Portions of Conduit, Access Service Roads, Lower Hellhole Siphon
K	8A	176-84	Topographic Map — Portions of Conduit, Telephone Line, Access Roads
K	9	176-85	Topographic Map — Portion of Conduit, Forebay Structure
K	10	176-86	Topographic Map — Lake Wohlford Dam, Penstock, Outlet Tower, Forebay
L	4	176-62	Plan of Lake Wohlford Dam with Steel Sheet Piling, Section of Outlet Tower, Inlet and Outlet Tunnels, Outlet Pipe
L	5	176-63	Bear Valley Powerhouse and Penstock

Exhibit R: Consisting of:

- (1) A map entitled "Recreation Map of Lake Wohlford" (FERC No. 176-64).
- (2) Twenty pages of text entitled "Exhibit R-1" filed with the Commission on July 15, 1971, as a part of the application for new license for Project No. 175.

Exhibit S: Consisting of:

Eight pages of text entitled "Exhibit S" filed with the Commission on July 15, 1971, as a part of the application for new license for Project No. 176.

- (iii) All of the structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, and including such portable property as may be used or

useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also, all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(B-3) This license is also subject to the terms and conditions set forth in Form L-16 (as revised October 1975) entitled "Terms and Conditions of License for Constructed Minor Project Affecting Lands of the United States," which terms and conditions designated as Articles 1 through 26 are attached to and made a part of this license, except that Article 19 is modified to read as follows,

Article 19. The Licensees shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, crops, lands, or other property of the United States including non-allotted tribal lands of the La Jolla, Rincon and San Pasqual Indian Reservations (which are held in trust by the United States), occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under this license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

subject to modification throughout to reflect the issuance of this license to the joint Licensees as distinguished from a single licensee, and subject to the following special conditions which are set forth as additional articles:

Article 27. Within 6 months after issuance of this license, the Licensees shall file under Sections 5.1 and 5.2 of the Commission's regulations under the Act, for Commission approval, revised Exhibits H, J, K, L, M, N, O,

R, S, V and W conforming to Section 4.41 of the regulations, reflecting the inclusion of Henshaw Dam and Lake Henshaw within Project No. 176, together with the lands and other facilities, including the pumping facilities, which are associated with the operation and maintenance of Henshaw Dam and Lake Henshaw, and the water rights which are incident to them, and also reflecting:

(1) Any construction or reconstruction of project works which may be necessary or appropriate to cause Henshaw Dam and its associated facilities to be structurally sound, safe and adequate;

(2) A permanent water operating plan for Project No. 176, including without limitation: operating regimes for Lake Henshaw and Henshaw Dam; operating regimes for the Warner Basin pumping facilities, including any limitations on the amount of groundwater which may be extracted from the Warner Basin; the possibility of modifying flows in the San Luis Rey River between Henshaw Dam and the diversion dam for purposes of enhancing the existing fishery and developing a year-round fishery, and, in conjunction with the latter, benefitting incidentally the Pauma and Pala Basins; and the possibility of modifying flows through the powerhouses for the purpose of enhancing the generation of electric power consistent with other beneficial public uses of the water;

(3) Any construction or reconstruction of project works which may be necessary or appropriate to carry out the permanent water operating plan for Project No. 176; and

(4) The construction or reconstruction of project works which are necessary or appropriate to replace existing works on the San Pasqual Indian Reservation and permit abandonment of all or part of the project works on, and the restoration of, that reservation.

Article 28. In conjunction with or following the final disposition of the pending or any substituted litigation involving the water and related contractual rights which are incident to Project No. 176, and upon petition filed by any party or parties to that litigation, the Commission may modify this license in any manner considered appropriate in the light of the pending or concluded final disposition of that litigation.

Article 29. For the purpose of this Article 29, the term "Indian Service Area" is defined as consisting of those portions of the La Jolla and Rincon Indian Reservations situated generally to the south and west of Contour 1785 (mean sea level) which begins at the southern boundary of the La Jolla Indian Reservation, passes through the crest of the spillway of the diversion dam on the San Luis Rey River, crosses the boundary common to the two reservations and ends at the northern boundary of the Rincon Indian Reservation; plus, so long as the conduit mentioned in the second paragraph of this Article 29 continues to occupy any portion of the San Pasqual Indian Reservation, the eastern portion of the San Pasqual Indian Reservation, including the NW 1/4 of the NE 1/4 of Section 27, Township 11 South, Range 1 West, S.B.M., and that part of the southern portion of the San Pasqual Indian Reservation which is the SE 1/4 of the SW 1/4 of Section 27, Township 11 South, Range 1 West, S.B.M., which Indian Service Area is approximated by shading on Appendix A attached to and made a part of this license.

Subject to the provisions of Articles 28 and 31, the Licensees shall permit diversions of water from the conduit which begins at the diversion dam on the San Luis Rey River and ends at a terminal structure near Lake Wohlford (the Escondido Canal), in the volumes and flows which are authorized in writing by the Commission and can be and

are in fact utilized for domestic, agricultural, stockwatering or small commercial consumption within the Indian Service Area, and at the times and to the extent that sufficient volumes and flows are available in the Escondido Canal. Nothing in this Article 29 shall preclude the Licensees from closing the Escondido Canal or portions of the Escondido Canal for reasonable periods of time for maintenance and repairs or for other prudent reasons, or from restricting the flow in the Escondido Canal consistent with any operating plan for Project No. 176 approved by the Commission. Nothing in this Article 29 shall require the Licensees to provide distribution services without just compensation.

The La Jolla, Rincon and San Pasqual Bands of Mission Indians, as entities, or enrolled members or groups of members of the respective Bands evidencing written authority to do so, may apply for authorization to divert water from the Escondido Canal by filing petitions with the Commission (and transmitting copies to the Licensees) specifying the maximum annual volumes and the maximum periodic flows for which authorization is requested, together with copies of the plans and specifications for any diversion facilities to be installed or constructed, and evidence that the plans and specifications have been approved by the Licensees, or evidence of the Licensees' objections to the plans and specifications and the reasons why the plans and specifications cannot be changed, together with other reasonable information which may be requested by the Commission or the Licensees. Authority to act on such petitions is hereby delegated to the Commission officer who is then performing the functions which are performed at the time of issuance of this license by the Director of the Division of Licensed Projects, Office of Electric Power Regulation, or that officer's Deputy.

Any authorization to divert water from the Escondido Canal shall be on the following conditions:

(a) The Bands, members or groups of members having authorization shall install at such locations and operate and maintain, all at their expense, any metering or other measuring devices which the Licensees may reasonably request to monitor compliance with this Article 29 and with the authorization. (b) The Licensees may cause any such metering or other measuring device to be repaired if it is not first repaired within a reasonable time specified in a notice to repair, and may deduct the cost of repairs from the amount of annual charges which are next payable. (c) The Licensees shall have reasonable access to the La Jolla, Rincon and San Pasqual Indian Reservations for such monitoring purposes.

Article 30. The Licensees shall pay to the United States the following annual charges, effective as of the first day of the month in which this license is issued:

(i) For the purpose of reimbursing the United States for the cost of administration of Part I of the Federal Power Act, a reasonable annual charge as determined by the Commission from time to time in accordance with its regulations. The authorized installed capacity for this purpose is 1,010 horsepower.

(ii) For the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations, a reasonable annual charge determined by multiplying thirty-seven and one-half percent of the Net Water Benefit of Project No. 176, by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the lands of the United States other than tribal lands embraced within Indian res-

ervations, by the sum of (a) the total distance in feet traversed by the Escondido Canal from Station 1 through Station 302A, inclusive, and (b) the distance in feet traversed from Station 302A to Station 303 of the Escondido Canal and through a 36-inch diameter concrete pipe; an additional conduit; a 320-foot long, 42-inch diameter concrete pipe; Escondido Creek and Lake Wohlford to the outlet tower, and then through the 4,195-foot long outlet pipe and penstock, which distances are to be determined as of the beginning of the calendar year.

(iii) For the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, other than the tribal lands within the Rincon Indian Reservation which are used and occupied for the generation of electric power, and other than certain tribal lands within the La Jolla, Rincon and San Pasqual Indian Reservations which are used and occupied for communication and other services by wire, a reasonable annual charge determined by multiplying thirty-seven and one-half percent of the Net Water Benefit of Project No. 176, by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, by the sum specified in subparagraph (ii) above.

(iv) For the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the Rincon Indian Reservation which are used and occupied for the generation of electric power, a reasonable annual charge equal to fifty per cent of the Net Rincon Power Benefit of Project No. 176.

(v) For the purpose of recompensing the United States for the use, occupancy and enjoyment of tribal lands

embraced within the La Jolla, Rincon and San Pasqual Indian Reservations which are used and occupied for communication and other services by wire, a reasonable annual charge determined by the Commission from time to time in accordance with its regulations for recompensing the United States for the use, occupancy and enjoyment of its lands (for transmission line rights-of-way only) other than tribal lands embraced within Indian reservations; provided, that such annual charge shall be one-half of that amount for any year with respect to any tribal lands which are used, occupied and enjoyed for communication and other services by wire, by both the Licensees and residents of the respective reservations.

For the purpose of subparagraph (iii) of this Article 30, and Article 31: The term "Net Canal Water" is defined as the volume of water which leaves the conduit Escondido Canal during a calendar year, as measured at or near the terminal structure near Lake Wohlford. The term "Gross Canal Water" is defined as the sum of the Net Canal Water and the aggregate measured volumes of water which are diverted from the Escondido Canal during the same calendar year pursuant to Article 29. The term "Cost of Canal Water" is defined as the cost to the Licensees of operating the water supply facilities of Project No. 176 during a calendar year. The term "Cost of Alternative Water" is defined as the computed cost to the Licensees of obtaining the least expensive water equal in volume to their respective percentage shares of Net Canal Water for a calendar year, as weighted for their respective percentage domestic/agricultural distribution patterns for the same calendar year. And the term "Net Water Benefit" is defined as the difference between the Cost of Alternative Water and the lower Cost of Canal Water for a calendar year.

For the purpose of subparagraph (iv) of this Article 30: The term "Cost of Rincon Power" is defined as the sum of the cost to the Licensees of operating and maintaining the Rincon power facilities (including property taxes and amortization attributable thereto), and all demand, energy and other charges incurred for power purchased and resold to the Rincon Band of Mission Indians, during a calendar year. The term "Rincon Power Revenues" is defined as the sum of all demand, energy and other charges invoiced for power generated by the Rincon power facilities, and for power purchased and resold to the Rincon Band of Mission Indians, during the same calendar year. And the term "Net Rincon Power Benefit" is defined as the difference between the Rincon Power Revenues and the lower Cost of Rincon Power for a calendar year.

The said annual charges in subparagraph (iii) above for the use, occupancy and enjoyment of tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations shall be placed to the credit of the La Jolla, Rincon and San Pasqual Bands of Mission Indians, respectively, as follows: First, the Cost of Alternative Water to the respective Licensees shall be recomputed by utilizing Gross Canal Water instead of Net Canal Water, and the lower Cost of Canal Water shall be deducted to derive a Gross Water Benefit as though the respective Bands diverted no water from the Escondido Canal during the calendar year. Second, thirty-seven and one-half percent of the Gross Water Benefit of Project No. 176, multiplied by the percentage specified in subparagraph (iii) above, shall be placed tentatively to the credit of the respective Bands in proportion to the respective distances traversed by the Escondido Canal through their respective tribal lands, which distances are to be determined as of the beginning of the calendar year. And third, the difference between the aggregate amounts which are so

placed tentatively to the credit of the respective Bands and the annual charge paid by the Licensees as provided in subparagraph (iii) above, shall be deducted from the said tentative credits in proportion to the measured volumes of water diverted from the Escondido Canal to the respective tribal lands pursuant to Article 29 during the calendar year, and the remaining amounts shall be placed to the credit of the La Jolla, Rincon and San Pasqual Bands of Mission Indians, respectively.

The said annual charges in subparagraph (iv) above for the use, occupancy and enjoyment of tribal lands embraced within the Rincon Indian Reservation shall be placed to the credit of the Rincon Band of Mission Indians. And the said annual charges in subparagraph (v) above for the use, occupancy and enjoyment of tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations shall be placed to the credit of the La Jolla, Rincon and San Pasqual Bands of Mission Indians, respectively, in proportion to the acreage occupied within their respective reservations by the rights-of-way for the transmission lines for which the annual charges are imposed.

The Licensees shall install, operate and maintain at their expense a metering or other measuring device at or near the terminal structure of the Escondido Canal.

The Licensees shall file with the Commission and serve upon designees of the La Jolla, Rincon and San Pasqual Bands of Mission Indians and the Department of the Interior, on or before February 1 of each year, a statement under oath showing all of the information which is necessary or useful for the computation and crediting of annual charges as provided in Article 29 and this Article 30, together with their computations. The La Jolla, Rincon and San Pasqual Bands of Mission Indians and the Department of the Interior may file with the Commission and transmit to the Licensees,

and the others mentioned in this paragraph, on or before March 1 of each year, a statement under oath in opposition to the said information and computations. Such statements shall be considered and acted upon by the Commission officer who is then performing the functions which are performed at the time of issuance of this license by the Director of the Division of Licensed Projects, Office of Electric Power Regulation, or that officer's Deputy, to whom authority to so act is hereby delegated.

Article 31. The La Jolla, Rincon and San Pasqual Bands of Mission Indians shall reimburse the Licensees in accordance with the following schedule for that part of the "Cost of Canal Water," as that term is defined in Article 30, which is applicable to the facilities of Project No. 176 situated upstream from the metering or other measuring device to be installed and maintained pursuant to Article 30 at or near the terminal structure of the Escondido Canal:

Aggregate Measured Volumes of Water Diverted Pursuant to Article 29, as a Percentage of Gross Canal Water		Percentage of Specified Part of Cost of Canal Water to be Reimbursed
<u>At Least</u>	<u>But Less Than</u>	
—	12%	Zero
12%	13	1.5%
13	14	3.0
14	15	4.5
15	16	6.0
16	17	7.5
17	18	9.0
18	19	10.5
19	20	12.0
20	21	13.5
21	22	15.0
22	23	16.5

<u>At Least</u>	<u>But Less Than</u>	
23	24	18.0
24	25	19.5
25	26	21.0
26	27	22.5
27	28	24.0
28	29	25.5
29	30	27.0
30	31	28.5
31	32	30.0
32	33	31.5
33	—	The percentage of Gross Canal Water

The Cost of Canal Water, the Gross Canal Water and the measured volumes of water which are diverted pursuant to Article 29 shall be the same as are ultimately approved pursuant to Article 30 by the Commission officer specified therein; and the amounts to be so reimbursed shall be apportioned among the La Jolla, Rincon and San Pasqual Bands of Mission Indians in accordance with the measured volumes of water diverted to their respective tribal lands, and shall be due and payable to the Licensees on the date on which annual charges are payable by the Licensees to the United States.

The obligation of the Licensees under Article 29 to permit diversions of water to the respective tribal lands of the La Jolla, Rincon and San Pasqual Bands of Mission Indians shall be suspended during any period of time in which the amount due from a particular Band under Article 30 or this Article 31 remains unpaid.

Article 32. The Licensees shall use their best efforts to negotiate a reasonable contract with the San Pasqual Band of Mission Indians which arguably may be required by Section 8 of the Mission Indian Relief Act or Section 16 of the Indian Reorganization Act, or both such statutes, to permit

the construction of facilities for the conveyance of water across the San Pasqual Indian Reservation, and the operation and maintenance of those and existing facilities and the utilization of the rights-of-way through the San Pasqual Indian Reservation occupied by all such facilities throughout the maximum possible term of this license, including the terms of possible annual licenses which may be issued after the expiration of this license; and the Licensees shall also use their best efforts to obtain the approval of the Secretary of the Interior. Copies of any such contract and any documents evidencing its approval, with or without conditions, or its non-approval, shall be filed with the Commission for consideration in conjunction with the exhibits to be filed pursuant to Article 27 for the construction or reconstruction of project works to replace existing works on the San Pasqual Indian Reservation.

Article 33. Access roads and pack trails may be relocated pursuant to advance agreement in writing between the Licensees and the beneficial owner of the affected land who, in the case of the La Jolla, Rincon and San Pasqual Indian Reservations, shall be deemed to be the Band whose reservation is affected, subject to any approval required by law. Promptly upon the completion of any such relocation, the Licensees shall file for Commission approval appropriate Exhibit K drawings showing the roads and/or trails as so relocated.

Article 34. The Licensees shall use their best efforts to fulfill all of their valid contractual obligations to supply electric power and water to the Bands of Indians residing on the La Jolla, Rincon, San Pasqual, Pala and Pauma (including the Yuima) Indian Reservations, subject to the terms and conditions of this license and of all valid contracts between one or more of the Licensees (or their predecessors) and one or more of the said Bands (or the United States or

the Secretary of the Interior on behalf of one or more of the said Bands).

For the purpose of this Article 34: Contracts and contractual obligations shall be treated as "valid" until determined otherwise by a court of competent jurisdiction and the final disposition of that proceeding, or until superseded by a later contract which terminates the earlier contract and/or contractual obligation. The obligation under the agreement of June 28, 1922, to drill wells and construct facilities to furnish the Pala Band of Mission Indians "with the quantity of water for irrigation purposes to which they are entitled" shall be treated as one to furnish that Band with a minimum flow of three cubic feet per second.

The Licensees shall install, operate and maintain at their expense a metering or other measuring device at or near the eastern boundary of the Pala Indian Reservation.

Article 35. Promptly, and no later than three months from the effective date of this license, the Licensees shall file with the Commission and implement an emergency action plan to provide early warning to upstream and downstream inhabitants, property owners, operators of water-related facilities, and other persons who might be affected, whenever there is a threatened or actual sudden release of water resulting from accident, natural disaster, or failure of project works. That plan shall include: (a) instructions to be provided on a continuing basis to operators and attendants for actions they are to take throughout such an emergency, including actions to reduce inflows to reservoirs to the extent possible, such as by limiting outflows from upstream dams or control structures and actions to reduce downstream flows to the extent possible, such as by limiting outflows from dams or control structures on tributary waterways; and (b) detailed plans for notifying, and documenting the time of notice to, the potentially affected persons, as well as inter-

ested federal, state and local authorities, including law enforcement and medical units. The Licensees shall file with that plan a summary of the study used for determining the upstream and downstream areas which could be affected by a sudden release of water, including all criteria and assumptions used. The Licensees shall monitor any changes in upstream or downstream conditions which might influence possible flows or affect areas or persons susceptible to harm, and shall promptly file with the Commission any necessary or desirable resulting changes in the emergency action plan and underlying study. In any event, not less often than every three years, the Licensees shall determine any changes in conditions which would make changes in the existing emergency action plan and underlying study necessary or desirable, and shall promptly file with the Commission and implement those changes, or notify the Commission in writing that they have determined that no changes are then necessary or desirable. The Commission reserves the right to require any modifications to the emergency action plan.

Article 36. In the interests of protecting and enhancing the scenic, recreational and other environmental values of the project, the Licensees: (1) shall supervise and control the use and occupancy of project lands and waters; (2) shall prohibit, without further Commission approval, the further use and occupancy of project lands and waters other than as specifically authorized by this license; (3) may authorize without further Commission approval, but subject to the approval of the La Jolla, Rincon, or San Pasqual Bands of Mission Indians and the Secretary of the Interior to the extent their approval is required by law, the use and occupancy of project lands and waters for landscape plantings and the construction, operation, and maintenance of access roads, power and telephone distribution lines, piers, landings, boat

docks, or similar structures and facilities, and embankments, bulkheads, retaining walls, or other similar structures for erosion control to protect the existing shoreline; (4) shall require, where feasible and desirable, the multiple use and occupancy of facilities for access to project lands and waters; and (5) shall ensure to the satisfaction of the Commission's authorized representative that all authorized uses and occupancies of project lands and waters (a) are consistent with shoreline aesthetic values, (b) are maintained in a good state of repair, and (c) comply with State and local health regulations. Under item (3) of this article, the Licensees may, among other things, institute a program for issuing permits to a reasonable extent for the authorized types of use and occupancy of project lands and waters. Under appropriate circumstances, permits may be subject to the payment of a fee in a reasonable amount. Before authorizing the construction of bulkheads or retaining walls, the Licensees shall: (a) inspect the site of the proposed construction, (b) determine that the proposed construction is needed, and (c) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site. If an authorized use or occupancy fails to comply with the conditions of this article or with any reasonable conditions imposed by the Licensees for the protection of the environmental quality of project lands and waters, the Licensees shall take appropriate action to correct the violations, including, if necessary, cancellation of the authorization and removal of any non-complying structures or facilities. The Licensees' consent to an authorized use or occupancy of project lands and waters shall not, without their express agreement, place upon the Licensees any obligation to construct or maintain any associated facilities. Within one year from the effective date of this license, the Licensees shall furnish a copy of their guidelines and procedures used to implement the pro-

visions of this article to the Commission's authorized representative and its Director, Office of Electric Power Regulation. Whenever the Licensees make any modification to these guidelines and procedures, they shall promptly furnish a copy to each of those persons. The Commission reserves the right to require modifications to these guidelines and procedures.

Article 37. Prior to the commencement of any construction or development of any project works or other facilities at the project, the Licensees shall consult and cooperate with the State Historic Preservation Officer (SHPO) to determine the need for, and extent of, any archeological or historic resource surveys and any mitigative measures that may be necessary. The Licensees shall provide funds in a reasonable amount for such activity. If any previously unrecorded archeological or historic sites are discovered during the course of construction, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Licensees shall consult with the SHPO to develop a mitigation plan for the protection of significant archeological or historic resources. If the Licensees and the SHPO cannot agree on the amount of money to be expended on archeological work, the Commission reserves the right to require the Licensees to conduct, at their own expense, any such work found necessary.

Article 38. The Licensees shall, to the satisfaction of the Commission's authorized representative, install and operate any signs, lights, sirens, or other safety devices that may be needed to warn the public of fluctuations in flow from the project and protect the public in its recreational use of project lands and waters.

Article 39. The Licensees shall file with the Commission's Regional Engineer in San Francisco, California, and

the Director, Office of Electric Power Regulation, one copy each of the contract drawings and specifications prior to the start of reconstruction of Henshaw Dam. The Director, Office of Electric Power Regulation, may require changes in the plans and specifications so as to assure a safe and adequate dam.

Article 40. The Licensees shall retain a Board of two or more qualified, independent engineering consultants to review the design, specifications, and reconstruction of Henshaw Dam for safety and adequacy. The names and qualifications of the Board members shall be submitted to the Director, Office of Electric Power Regulation, for approval. Among other things, the Board shall assess the geology of the project site and surroundings; the design, specifications and construction of the dam, spillway and equipment involved in water control and emergency power supply; the filling schedule for the reservoir, the construction inspection program; and construction procedures and progress. The Licensees shall submit to the Commission copies of the Board's report on each meeting. Reports reviewing the design, specifications, and construction of Henshaw Dam shall be submitted prior to or simultaneously with the submission of the corresponding Exhibit L final design drawings. The Licensees shall also submit a final report of the Board upon completion of the project. The final report shall contain a statement indicating the Board's satisfaction with the construction, safety, and adequacy of the project structures.

(B-4) Except insofar as the exhibits designated and described in Ordering Paragraph (B-2) fail to reflect the inclusion within Project No. 176 of Henshaw Dam and Lake Henshaw, together with the related lands, facilities and water rights, which omissions are to be remedied as required by Article 27, they are approved and made a part of the license.

(B-5) Pursuant to Section 10(i) of the Federal Power Act, the terms and conditions contained in the following sections of Part I of the Act are waived as being in the public interest: 4(e), insofar as it relates to approval of plans by the Chief of Engineers and the Secretary of the Army; 6, insofar as it relates to public notice and to the acceptance and expression in the license of terms and conditions of the Act that are waived in this license; 10(c), insofar as it relates to depreciation reserves; 10(d); 10(f); 11; 12; 19 and 20.

(B-6) This Ordering Paragraph (B) shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Act, and failure of the Licensees to file such an application shall constitute acceptance of this license for Project No. 176. In acknowledgment of this acceptance of the license and its terms and conditions, the license shall be signed for the Licensees and returned to the Commission within 60 days from the date of issuance of this Opinion and order.

(C) With respect to the license for Project No. 559, and subject to a possible mandatory stay of the effective date of the license for Project No. 176 as provided in Section 14(b) of the Federal Power Act (Act) and § 16.10 of the Commission's regulations under the Act:

(C-1) This new license is issued to San Diego Gas & Electric Company (License) pursuant to Part I of the Act, for a period effective the first day of the month in which this license is issued, and terminating on the same day as the new license issued concurrently for Project No. 176, for the continued operation and maintenance of transmission line Project No. 559 occupying lands of the United States within the Rincon Indian Reservation in San Diego County, California, subject to the terms and conditions of the Act, insofar as not expressly waived herein, which Act is incorporated by reference as part of this license, and subject

to the regulations the Commission issues under the provisions of the Act.

(C-2) Project No. 559 consists of:

(i) All lands, the use and occupancy of which are necessary or appropriate for the purposes of the project, constituting the project area and enclosed by the project boundary, which area consists of the 40-foot wide right-of-way beginning at the boundary of Project No. 176 enclosing the power house within the Rincon Indian Reservation, and extending approximately 2.4 miles in a northerly direction to the common boundary of the Rincon Indian Reservation and the Licensee's Rincon Substation, which right-of-way is occupied by a 12 kV primary transmission line and in major part by a 69 kV transmission line connecting the Licensee's Escondido and Rincon Substations.

(ii) All project works comprising a 12 kV wood pole transmission line, including all of the structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also, all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(C-3) This license is also subject to the terms and conditions set forth in Form L-20 (as revised October 1975) entitled "Terms and Conditions of License for Constructed Transmission Line Project," which terms and conditions designated as Articles 1 through 15 are attached to and made a part of this license, except that Article 9 is modified to

read as follows,

Article 9. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, crops, lands, or other property of the United States including non-allotted tribal lands of the Rincon Indian Reservation (which are held in trust by the United States) occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under this license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

and subject to the following special conditions which are set forth as additional articles:

Article 16. The Licensee shall not preclude residents of the Rincon Indian Reservation from using, occupying and enjoying tribal lands within the right-of-way herein licensed to the extent that such tribal lands are not physically occupied by project works; provided, that neither the Rincon Band of Mission Indians nor any residents of the Rincon Indian Reservation shall erect permanent structures or otherwise use, occupy and enjoy the said tribal lands in a manner which would interfere or be inconsistent with the Licensee's use, occupancy and enjoyment of the said tribal lands under this license, including obstruction of the Licensee's access to project works.

Article 17. The Licensee shall pay to the United States the following annual charges, effective as of the first day of the month in which this license is issued:

(i) For the purpose of reimbursing the United States for the cost of administration of Part I of the Federal Power Act, a reasonable annual charge as determined by the Com-

mission from time to time in accordance with its regulations. The minimum administrative charge (which is currently \$5.00 per annum) shall be applicable.

(ii) For the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the Rincon Indian Reservation, a reasonable annual charge determined by the Commission from time to time in accordance with its regulations for recompensing the United States for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations.

Article 18. Prior to the commencement of any construction or development of any project works or other facilities at the project, the Licensee shall consult and cooperate with the State Historic Preservation Officer (SHPO) to determine the need for, and extent of, any archeological or historic resource surveys and any mitigative measures that may be necessary. The Licensee shall provide funds in a reasonable amount for such activity. If any previously unrecorded archeological or historic sites are discovered during the course of construction, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Licensee shall consult with the SHPO to develop a mitigation plan for the protection of significant archeological or historic resources. If the Licensee and the SHPO cannot agree on the amount of money to be expended on archeological work, the Commission reserves the right to require the Licensee to conduct, at its own expense, any such work found necessary.

(C-4) Exhibits J, K and M filed with the application for a new license are hereby approved, but only to the extent that they show the general location of the project transmission line. The Licensee shall file within six months of the issuance of this new license revised Exhibits J, K and M

which shall depict the actual transmission line including the boundaries of the right-of-way herein licensed.

(C-5) Pursuant to Section 10(i) of the Federal Power Act, the terms and conditions contained in the following sections of Part I of the Act are waived as being in the public interest: 4(e), insofar as it relates to approval of plans by the Chief of Engineers and the Secretary of the Army; 6, insofar as it relates to public notice and to the acceptance and expression in the license of terms and conditions of the Act that are waived in this license; 10(c), insofar as it relates to depreciation reserves; 10(d); 10(f); 11; 12; 19 and 20.

(C-6) This Ordering Paragraph (C) shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Act, and failure of the Licensee to file such an application shall constitute acceptance of this license for Project No. 559. In acknowledgment of this acceptance of the license and its terms and conditions, the license shall be signed for the Licensee and returned to the Commission within 60 days from the date of issuance of this Opinion and order.

(D) Article 19 of the license for Project No. 176 issued to Escondido Mutual Water Company on June 25, 1924, as amended, is hereby amended as of September 23, 1969, with respect to the tribal lands of the La Jolla and Rincon Bands of Mission Indians, and as of May 26, 1970, with respect to the tribal lands of the San Pasqual Band of Mission Indians, as follows:

(D-1) Paragraph (b) of Article 19 is deleted.

(D-2) Paragraph (c) of Article 19 is redesignated as paragraph (b) and amended to read as follows:

For the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the Rincon and San Pasqual Indian Reser-

vations comprising the right-of-way for the former Rincon-Bear Valley transmission line, a reasonable annual charge of \$8.00 per mile until the date of restoration of the lands authorized by the license to be used for the line, which annual charge shall be placed to the credit of the Rincon and San Pasqual Bands of Mission Indians, respectively, in proportion to the acreage occupied within their respective reservations by the right-of-way for the line.

(D-3) Paragraph (d) of Article 19 is redesignated as paragraph (c) and amended to read as follows:

For the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands, including the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, other than the tribal lands within the Rincon Indian Reservation which are used and occupied for the generation of electric power, and other than the tribal lands within the Rincon and San Pasqual Indian Reservations comprising the right-of-way for the former Rincon-Bear Valley transmission line, a reasonable annual charge determined by multiplying fifty per cent of the Net Water Benefit of Project No. 176, by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the lands of the United States including the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, by the sum of (i) the total distance in feet traversed by the Escondido Canal from Station 1 through Station 302A, inclusive, and (ii) distance in feet traversed from Station 302A to Station 303 of the Escondido Canal and through a 36-inch diameter concrete pipe; an additional conduit; a 320-foot long, 42-inch diameter concrete pipe; Escondido Creek and Lake Wohlford to the outlet tower, and through the 4,195-foot long outlet pipe and penstock.

For the purpose of this paragraph (c): The Term "Net Canal Water" is defined as the volume of water which leaves the Escondido Canal during a calendar year. The term "Cost of Canal Water" is defined as the cost to the Licensee and Vista Irrigation District of operating the water supply facilities of Project No. 176 and the Henshaw development during a calendar year, multiplied by 4,143 acre-feet, and divided by the number of acre-feet comprising the Net Canal Water during the same calendar year. The term "Cost of Alternative Water" is defined as the computed cost to the Licensee of obtaining 4,143 acre-feet of water for a calendar year from the least expensive source, as weighted for the Licensee's percentage domestic-agricultural distribution pattern for the same calendar year. And the term "Net Water Benefit" is defined as the difference between the Cost of Alternative Water and the lower Cost of Canal Water for a calendar year.

The said annual charges in this paragraph (c) for the use, occupancy and enjoyment of lands of the United States, including tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, shall be placed to the credit of the United States and the La Jolla, Rincon and San Pasqual Bands of Mission Indians, respectively, in proportion to the respective distances traversed by the said conduit through their respective lands.

(D-4) A new paragraph (d) is added to Article 19, as follows:

For the purpose of recompensing the United States for the use, occupancy, and enjoyment of the tribal lands embraced within the Rincon Indian Reservation which are used and occupied for the generation of electric power, a reasonable annual charge equal to fifty per cent of the Net Rincon Power Benefit of Project No. 176.

For the purpose of this paragraph (d): The term "Cost of Rincon Power" is defined as the cost to the Licensee of operating and maintaining the Rincon power facilities (including property taxes and amortization attributable thereto), and all demand, energy and other charges incurred for power purchased and resold to the Rincon Band of Mission Indians, during a calendar year. The term "Rincon Power Revenues" is defined as the sum of all demand, energy and other charges invoiced for power generated by the Rincon power facilities, and for power purchased and resold to the Rincon Band of Mission Indians, during the same calendar year. And the term "Net Rincon Power Benefit" is defined as the difference between the Rincon Power Revenues and the lower Cost of Rincon Power for a calendar year.

The said annual charges in this paragraph (d) for the use, occupancy and enjoyment of tribal lands embraced within the Rincon Indian Reservation shall be placed to the credit of the Rincon Band of Mission Indians.

(D-5) A new paragraph (e) is added to Article 19, as follows:

The Licensee shall file with the Commission and serve upon designees of the La Jolla, Rincon and San Pasqual Bands of Mission Indians and the Department of the Interior, on or before February 1 of each year, a statement under oath showing all of the information which is necessary or useful for the computation and crediting of annual charges as provided in this Article 19, together with its computations. The La Jolla, Rincon and San Pasqual Bands of Mission Indians and the Department of the Interior may file with the Commission and transmit to the Licensee and the others mentioned in this paragraph, on or before March 1 of each year, a statement under oath in opposition to the said information and computations. Such statements shall be considered and acted upon by the Commission officer

who is then performing the functions which are performed at the time of this amendment by the Director of the Division of Licensed Projects, Office of Electric Power Regulation, or that officer's Deputy, to whom authority to act is hereby delegated.

The initial filing under this paragraph (e) covering all past periods shall be made within 90 days after the date of this amendment, and the initial filing in opposition, if any, shall be made within 120 days after the date of this amendment.

(D-6) A new paragraph (f) is added to Article 19, as follows:

The Licensee shall pay interest on the annual charges applicable to the tribal lands of the La Jolla, Rincon and San Pasqual Bands of Mission Indians (in excess of the amounts previously paid in the case of the San Pasqual Band) at the rate of 7% per annum on amounts payable prior to October 10, 1974; at the rate of 9% per annum on amounts accruing on and after October 10, 1974, on amounts payable prior to that date; and at the rate of 9% per annum on amounts payable on and after October 10, 1974, to the date(s) of payment.

(E) Pending further order of the Commission, Vista Irrigation District shall not modify or cause or permit others to modify Henshaw Dam, or any part of Henshaw Dam or any work appurtenant or accessory thereto, including without limitation Lake Henshaw and the Warner Ranch well field, or construct or cause or permit others to construct any works or structures used and useful in conjunction with the unit of development known as the Henshaw development, or any part thereof. Nonetheless, Vista Irrigation District may drill wells or cause or permit others to drill wells into Warner Ranch solely for the purpose of replacing deteriorating water wells, and shall operate and maintain all water

wells in the Warner Ranch well field in such a manner as to extract volumes and flows of water which shall not exceed the average volumes and flows extracted therefrom during the preceding five calendar years.

(F) Commencing concurrently with any stay of the effective date of Ordering Paragraph (B) of this Opinion and order issuing a license for Project No. 176, and until that license is effective or pending a further order of the Commission, whichever shall occur first, Escondido Mutual Water Company and Vista Irrigation District shall permit diversions of water from the Escondido Canal in such volumes and flows as are authorized in writing by the Commission and can be and are in fact utilized for domestic, agricultural, stockwatering and/or small commercial consumption within the "Indian Service Area" defined in Article 29 of that license, and at such times as, and to the extent that, sufficient volumes and flows are available in the said conduit, and shall otherwise operate Project No. 176 in the manner contemplated by Article 29. The Director, Division of Licensed Projects, Office of Electric Power Regulation, or his Deputy, and their successors, are hereby delegated authority to act on diversion requests pursuant to this Ordering Paragraph (F).

(G) In the event of any stay of the effective date of Ordering Paragraph (B) of this Opinion and order issuing a license for Project No. 176, Escondido Mutual Water Company and Vista Irrigation District shall, no later than three months from the date of issuance of this Opinion and order, file with the Commission and implement an emergency action plan to provide early warning as specified in Article 35 of that license, which article is incorporated into this Ordering Paragraph (G) by reference, and shall otherwise comply with Article 35 until that license is effective.

(H) The motion filed on June 30, 1977, by Pacific Gas and Electric Company, for leave to file an *amicus curiae* brief on exceptions, is granted.

(I) The motions requesting oral argument filed on September 6, 1977, by Escondido Mutual Water Company, the City of Escondido, California, and Vista Irrigation District, and by the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians and the Secretary of the Interior, are denied.

(j) The motion filed on January 9, 1978, by the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians is granted insofar as it requests permission to lodge a copy of the initial decision issued December 14, 1977, in *Northern States Power Company*, Project No. 108, and is denied insofar as it requests leave to file the supplemental brief attached thereto.

By the Commission. Commissioner Holden voted present.

(S E A L)

Lois D. Cashell,
Acting Secretary.

IN TESTIMONY of its acknowledgment of acceptance of all of the provisions, terms and conditions of this license, The Escondido Mutual Water Company this ____ day of _____, 1979, has caused its corporate name to be signed hereto by _____, its _____ President, and its corporate Seal to be affixed hereto and attested by _____, its _____ Secretary, pursuant to resolution of its Board of Directors duly adopted on the ____ day _____, 1979, a certified copy of the record of which is attached hereto.

ESCONDIDO MUTUAL WATER COMPANY

By _____
President

Attest:

Secretary

(Executed in quadruplicate)

IN TESTIMONY of its acknowledgement of acceptance of all of the provisions, terms and conditions of this license, The City of Escondido, California, this _____ day of _____, 1979, has caused its State of California general law city name to be signed hereto by _____, its Mayor, and its official Seal to be affixed hereto and attested by _____, its City Clerk, pursuant to a resolution of its City Council duly adopted on the ____ day of _____, 1979, a certified copy of the record of which is attached hereto.

CITY OF ESCONDIDO, CALIFORNIA

By _____
Mayor

Attest:

City Clerk
(Executed in quadruplicate)

IN TESTIMONY of its acknowledgement of acceptance of all of the provisions, terms and conditions of this license, The Vista Irrigation District this ____ day of _____, 1979, has caused its State of California water code name to be signed hereto by _____, its _____, and its official Seal to be affixed hereto and attested by _____, its _____, pursuant to a resolution of its _____ duly adopted on the ____ day _____, 1979, a certified copy of the record of which is attached hereto.

VISTA IRRIGATION DISTRICT

By _____
(Title)

Attest:

(Title)

(Executed in quadruplicate)

IN TESTIMONY of its acknowledgement of acceptance of all of the provisions, terms and conditions of this license, The San Diego Gas & Electric Company this ____ day of _____, 1979, has caused its corporate name to be signed hereto by _____, its _____ President, and its corporate Seal to be affixed hereto and attested by _____, its _____ Secretary, pursuant to a resolution of its Board of Directors duly adopted on the ____ day of _____, 1979, a certified copy of the record of which is attached hereto.

SAN DIEGO GAS & ELECTRIC
COMPANY

By _____
President

Attest:

Secretary
(Executed in quadruplicate)

Form L-16
(October, 1975)

FEDERAL ENERGY REGULATORY COMMISSION
TERMS AND CONDITIONS OF LICENSE FOR
CONSTRUCTED MINOR PROJECT AFFECTING
LANDS OF THE UNITED STATES

Article 1. The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: *Provided, however,* That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project area and project works shall be in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alteration or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any

emergency alteration, addition, or use so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct.

Article 4. The project, including its operation and maintenance and any work incidental to additions or alterations authorized by the Commission, whether or not conducted upon lands of the United States, shall be subject to the inspection and supervision of the Regional Engineer, Federal Energy Regulatory Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him such information as he may require concerning the operation and maintenance of the project, and any such alterations thereto, and shall notify him of the date upon which work with respect to any alteration will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall submit to said representative a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of any such alterations to the project. Construction of said alterations or

any feature thereof shall not be initiated until the program of inspection for the alterations or any feature thereof has been approved by said representative. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

Article 5. The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed

voluntary transfers within the meaning of this article.

Article 6. The Licensee shall install and thereafter maintain gages and stream-gaging stations for the purpose of determining the stage and flow of the stream or streams on which the project is located, the amount of water held in and withdrawn from storage, and the effective head on the turbines; shall provide for the required reading of such gages and for the adequate rating of such stations; and shall install and maintain standard meters adequate for the determination of the amount of electric energy generated by the project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission or its authorized representative. The Commission reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 7. The Licensee shall, after notice and opportunity for hearing, install additional capacity or make other

changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

Article 8. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power systems and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

Article 9. The operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Commission may prescribe for the purposes hereinbefore mentioned.

Article 10. On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable com-

pensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur. Any such compensation shall be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

Article 11. The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

Article 12. Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of the Licensee's lands and interests in lands, reservoirs, waterways and project works as may be reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Li-

censee shall modify the project operation as may be reasonably prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

Article 13. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting: *Provided*, That the Licensee may reserve from public access such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

Article 14. In the construction, maintenance, or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon request or upon its own motion, may order the Licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

Article 15. The Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the maintenance or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may

die during operations of the project shall be removed. All clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 16. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance of the project works, or in the clearing of said lands, shall be paid for, and the resulting slash and debris disposed of, in accordance with the requirements of the agency of the United States having jurisdiction over said lands. Payment for merchantable timber shall be at current stumpage rates, and payment for young growth timber below merchantable size shall be at current damage appraisal values. However, the agency of the United States having jurisdiction may sell or dispose of the merchantable timber to others than the Licensee: *Provided*, That timber so sold or disposed of shall be cut and removed from the area prior to, or without undue interference with, clearing operations of the Licensee and in coordination with the Licensee's project construction schedules. Such sale or disposal to others shall not relieve the Licensee of responsibility for the clearing and disposal of all slash and debris from project lands.

Article 17. The Licensee shall do everything reasonably within its power, and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon the request of officers of the agency concerned, to prevent, to make advance preparations for suppression of, and to suppress fires on the lands to be occupied or used under the license. The Licensee shall be liable for and shall pay the costs incurred by the United States in suppressing fires caused from the construction, operation, or maintenance of the

project works or of the works appurtenant or accessory thereto under the license.

Article 18. The Licensee shall interpose no objection to, and shall in no way prevent, the use by the agency of the United States having jurisdiction over the lands of the United States affected, or by persons or corporations occupying lands of the United States under permit, of water for fire suppression from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license, or the use by said parties of water for sanitary and domestic purposes from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license.

Article 19. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 20. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across those project lands which are lands of the United States such conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other routes or means of transportation and communication as are not inconsistent with the enjoyment of said lands by the Licensee for the purposes of the license. This license shall not be construed as conferring upon the Licensee any right to use, occupancy, or enjoyment of the lands of the United

States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 21. In the construction and maintenance of the project, the location and standards of roads and trails on lands of the United States and other uses of lands of the United States, including the location and condition of quarries, borrow pits, and spoil disposal areas, shall be subject to the approval of the department or agency of the United States having supervision over the lands involved.

Article 22. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of the United States affected, of making provision for avoiding inductive interference between any project transmission line or other project facility constructed, operated, or maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction.

Article 23. The Licensee shall make use of the Commission's guidelines and other recognized guidelines for treatment of transmission line rights-of-way, and shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, all refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the transmission lines; shall cut and remove all dead or leaning trees which might fall in contact with the transmission lines; and shall take such other precautions against fire as may be required by such officer. No fires for the burning of waste material shall be set except with the prior written consent

of the officer of the United States in charge of the lands as to time and place.

Article 24. If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

Article 25. The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and regulations, or

an annual license under the terms and conditions of this license.

Article 26. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

Form L-20
(October, 1975)

FEDERAL ENERGY REGULATORY COMMISSION
TERMS AND CONDITIONS OF LICENSE FOR
CONSTRUCTED TRANSMISSION LINE PROJECT

Article 1. The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: *Provided, however,* That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project area and project works shall be in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alteration or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any emergency alteration, addition, or use so made shall there-

after be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct.

Article 4. The project, including its operation and maintenance and any work incidental to additions or alterations authorized by the Commission, whether or not conducted upon lands of the United States, shall be subject to the inspection and supervision of the Regional Engineer, Federal Energy Regulatory Commission, in the region wherein the project is located or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him such information as he may require concerning the operation and maintenance of the project, and any such alterations thereto, and shall notify him of the date upon which work with respect to any alteration will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall submit to said representative a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of any such alterations to the project. Construction of said alterations or any feature thereof shall not be initiated until the program

of inspection for the alterations or any feature thereof has been approved by said representative. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

Article 5. The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

Article 6. In the construction or maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling or obstructing traffic or endangering life. None of the provisions of this article are intended to relieve the Licensee from any responsibility or requirement which may be imposed by any other lawful authority for avoiding or eliminating inductive interference.

Article 7. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance of the project works, or in the clearing of said lands, shall be paid for, and the resulting slash and debris disposed of, in accordance with the requirements of the agency of the United States having jurisdiction over said lands. Payment for merchantable timber shall be at current stumpage rates, and payment for young growth timber below merchantable size shall be at current damage appraisal values. However, the agency of the United States having jurisdiction may sell or dispose of the merchantable timber to others than the Licensee: *Provided*, That timber so sold or disposed of shall be cut and removed from the area prior to, or without undue interference with, clearing operations of the Licensee and in coordination with the Licensee's project construction schedules. Such sale or disposal to others shall not relieve the Licensee of responsibility for the clearing and disposal of all slash and debris from project lands.

Article 8. The Licensee shall do everything reasonably within its power, and shall require its employees, contrac-

tors, and employees of contractors to do everything reasonably within their power, both independently and upon the request of officers of the agency concerned, to prevent, to make advance preparations for suppression of, and to suppress fires on the lands to be occupied or used under the license. The Licensee shall be liable for and shall pay the costs incurred by the United States in suppressing fires caused from the construction, operation, or maintenance of the project works or of the works appurtenant or accessory thereto under the license.

Article 9. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 10. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across those project lands which are lands of the United States such conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other routes or means of transportation and communication as are not inconsistent with the enjoyment of said lands by the Licensee for the purposes of the license. This license shall not be construed as conferring upon the Licensee any right of use, occupancy, or enjoyment of the lands of the United States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 11. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of

the United States affected, of making provision for avoiding inductive interference between any project transmission line or other project facility constructed, operated, or maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction.

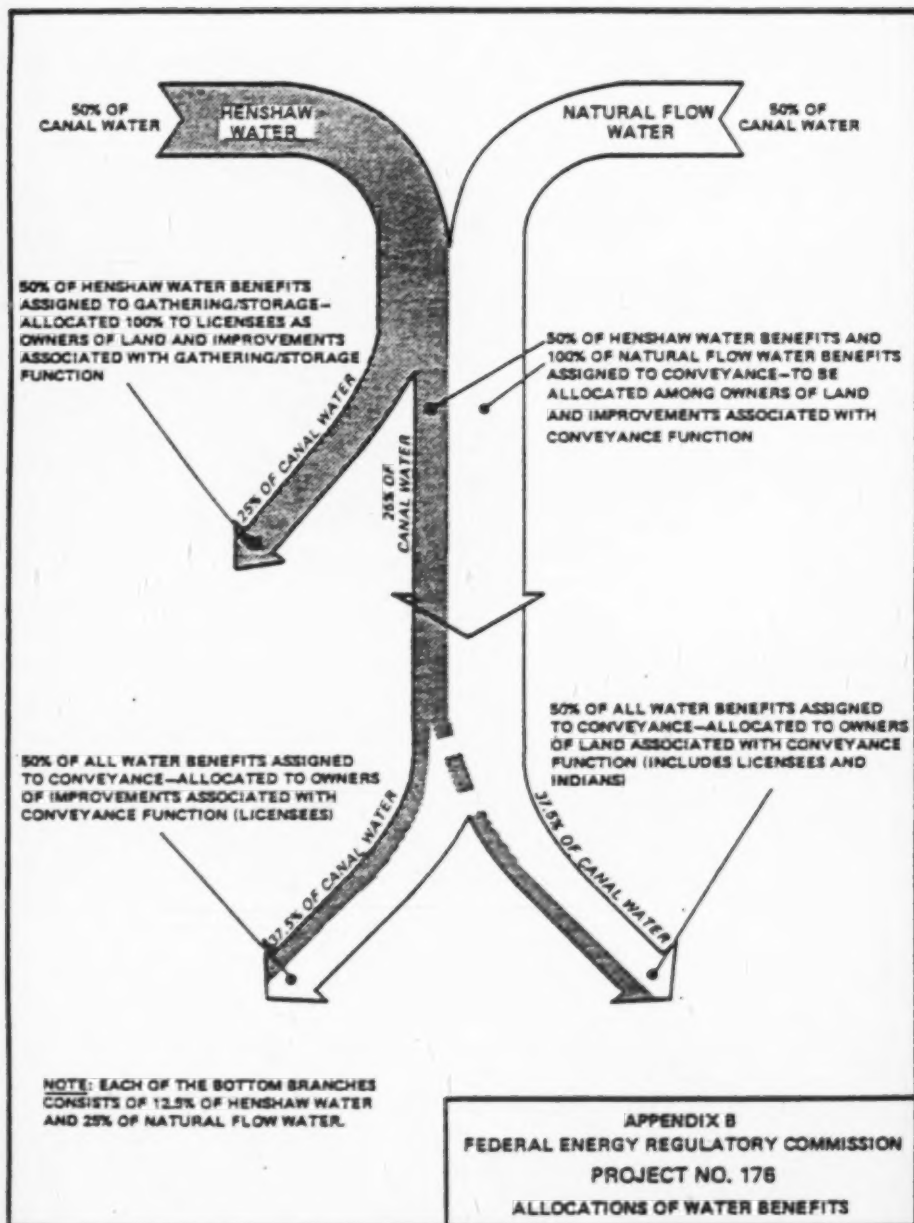
Article 12. The Licensee shall make use of the Commission guidelines and other recognized guidelines for treatment of transmission line rights-of-way, and shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, ~~all~~ refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the transmission lines; shall cut and remove all dead or leaning trees which might fall in contact with the transmission lines; and shall take such other precautions against fire as may be required by such officer. No fires for the burning of waste material shall be set except with the prior written consent of the officer of the United States in charge of the lands as to time and place.

Article 13. If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for

hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

Article 14. The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and regulations, or an annual license under the terms and conditions of this license.

Article 15. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.



Federal Energy Regulatory Commission

Opinion No. 36-A

Issued November 26, 1979.

Net Investment, Severance Damages, Annual Charges
United States of America Federal Energy Regulatory
Commission.

Before Commissioners: Charles B. Curtis, Chairman;
Georgiana Sheldon, Matthew Holden, Jr., and George R.
Hall.

Escondido Mutual Water Company; City of Escondido,
California; and Vista Irrigation District. Project No. 176;
Docket No. E-7562.

Secretary of the Interior Acting in His Capacity as Trustee
for the Rincon, La Jolla and San Pasqual Bands of Mission
Indians v. Escondido Mutual Water Company and City of
Escondido, California; Vista Irrigation District; San Diego
Gas & Electric Company. Docket No. E-7655; Project No.
559.

OPINION NO. 36-A

**OPINION AND ORDER ON REHEARING
MODIFYING LICENSES AND STAY, DETERMINING
NET INVESTMENT AND SEVERANCE DAMAGES,
AND OTHERWISE DENYING REHEARING**

(Issued November 26, 1979)

AN OVERVIEW

In Opinion No. 36 issued February 26, 1979, the
Commission¹, among other actions, issued new licenses for

¹The term "Commission" refers to the Federal Power Commission
in contexts prior to October 1, 1977, and to the Federal Energy Reg-
ulatory Commission in contexts on and after that date.

Project Nos. 176 and 559², amended a 1924 license for Project No. 176, and ordered Mutual and Vista to permit diversions of water from a conduit known as the Escondido Canal to portions of three Indian reservations designated as an Indian Service Area. On March 28, 1979, petitions for rehearing of that opinion and motions for a stay were filed by the Licensees, the Bands³ and the Secretary of the Interior (Interior). On the same day, a motion to reopen the record and for other purposes was filed jointly by the Bands and Interior. On April 12, 1979, the Bands filed a response to the Licensees' motion for a stay. On the same day, the Licensees filed an opposition to the Bands' and Interior's motions for a stay and to reopen the record, which opposition was supported by Interior on April 16, 1979.

On April 27, 1979, the Commission granted rehearing for further consideration; stayed Ordering Paragraphs (B) and (C) issuing the two licenses, Ordering Paragraph (D) amending the 1924 license and Ordering Paragraph (F) providing water for the Indian Service Area in the event of a stay of Ordering Paragraph (B); and authorized the filing of responses to the respective petitions for rehearing. Today, upon consideration of the petitions for rehearing and the other filings of the parties, including their responses to the petitions,⁴ we are modifying the old and new licenses for Project No. 176, together with the new license for Project No. 559, and clarifying some of the provisions in the light

²To Escondido Mutual Water Company (Mutual), the City of Escondido, California (Escondido), and Vista Irrigation District (Vista) (collectively, the Licensees), in the case of Project No. 176, and to San Diego Gas & Electric Company (SDG&E) in the case of Project No. 559.

³The La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians.

⁴Although we are addressing only some of the matters raised, we have considered all of the arguments.

of the questions that have been asked. We are also vacating the stay of April 27, 1979, which was imposed to preserve the *status quo* pending rehearing of Opinion No. 36, and implementing a two-year stay of the effective date of Ordering Paragraph (B) of Opinion No. 36 mandated by Section 14(b) of the Federal Power Act.⁵

NET INVESTMENT AND SEVERANCE DAMAGES⁶

Generally

The Bands' and Interior's petitions for rehearing contend that we erred, among other reasons, for failing to determine net investment and severance damages. Opinion No. 36 explains, however, at page 77,

Since the Commission is not either issuing a license to the Bands or joining Interior in recommending take-over, such a determination need not be made if Interior changes its position upon consideration of this Opinion and order and chooses not to move for a stay pursuant to 18 CFR § 6.10 [sic., § 16.10]. We will, therefore,

⁵Section 14(b) provides, in pertinent part,

... In any relicensing proceeding before the Commission any Federal department or agency may timely recommend ... that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if it does not itself recommend such action ... shall upon motion of such department or agency stay the effective date of any order issuing a license ... for two years after the date of issuance of such order. ...

Since the two-year period from the issuance of an order issuing a license specified in Section 14(b) does not take into consideration that we are required by Section 313(a) to consider applications for rehearing of orders issuing licenses, we are treating that two-year period as running from the date of our action on rehearing, to carry out the intent of Section 14(b) of giving Congress two full years to consider whether or not the United States should take over a project.

⁶On May 21, 1979, the Bands filed a motion to strike the portion of Mutual's, Escondido's and Vista's response to the petitions for rehearing that addresses net investment and severance damages, contending that those matters exceed the scope of the petitions. While the Bands are technically correct, we will deny their motion since we have considered the similar arguments in the briefs to the administrative law judge.

defer making such a determination until one is required. Among other reasons for requesting a stay, Interior said that it was "not in a position to make a clear recommendation to the Congress until such time as these potential costs are determined by the Commission", and

In the alternative, if the foregoing request of the Secretary of the Interior is denied, then the Secretary invokes Section 14(b) of the Federal Power Act and moves to stay the effective date of the Commission's orders issuing the license to the Vista Irrigation District, the Escondido Mutual Water Company and the City of Escondido in Project No. 176 for two years after the date of issuance.

Since we are vacating the stay of April 27, 1979, and Interior has not changed its position, a determination of net investment and severance damages is now required.

Section 14(a) of the Federal Power Act provides, in this connection,

Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license . . . upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent [for its usefulness upon the continuance of the license] but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such

severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.⁷

Net Investment

Section 3(13) of the Federal Power Act defines the term "net investment" in a project as meaning

the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar cost of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto,

⁷As discussed in Opinion No. 36 at 51 (Footnote 77) and 74 through 78, the Act of August 15, 1953, provides that Section 14 is not applicable to projects owned by States or municipalities, and we have interpreted that to mean interests owned by States or municipalities. Therefore, if the United States takes over the works of Project No. 176 that are subject to the 1924 license, as amended, it must pay just compensation for the minor interests owned by Vista, and it may pay either (a) net investment plus severance damages, or (b) just compensation if Congress specially so provides, for the interests owned by Mutual. Furthermore, if the United States acquires the Henshaw development it must pay just compensation to Vista whether or not the Henshaw development was licensed as part of Project No. 176 in 1924, in view of the Act of August 15, 1953, and the Fifth Amendment to the Constitution.

if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission.

A determination of the "net investment" of a project under that definition begins with a determination of the "actual legitimate original cost" of that project, which is the cost to the first purchaser making public use of the facility. The parties agree that the actual legitimate original cost of Project No. 176, plus the similar cost of additions thereto and betterments thereof, was \$869,494 as of June 24, 1974, the date on which Mutual's 1924 license expired.* That amount represents the difference between the total plant in service (\$1,294,558), and the contributions by Vista and its predecessor, San Diego County Water Company

*Since Section 14(a) speaks of the payment of the net investment of the licensee "in the project or projects taken," another determination of net investment appears to be required shortly before and as of the time of taking possession, to determine any changes in net investment between the expiration date of the license and the takeover date.

(\$425,064).⁹

After the sum of the actual legitimate original cost and the similar cost of additions and betterments is determined, three items are deducted¹⁰ "if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment". Mutual, Escondido and Vista contend that the "fair return" on Mutual's investment should be determined in accordance with Article 20 of Mutual's 1924 license (which article is mandated by Section 10(d) of the Federal Power Act, *infra*), that Mutual's "earnings" have been less than a "fair return" as so determined and, consequently, that the three items should not be deducted from the sum of the foregoing costs, resulting in a "net investment" of \$869,494. The Commission staff, Interior and the Bands contend, on the other hand, that the accumulated depreciation constitutes "earnings in excess of a fair return", that the amount of the depreciation should therefore be deducted from the sum of the foregoing costs, and that the resulting "net investment" is zero since the amounts of the investment and depreciation are equal.

Today, we regard depreciation as a non-cash expense which contributes to the cash flow of an enterprise and can

⁹Mutual's actual legitimate original cost was first determined by the Commission on August 2, 1949. 8 FPC 1047. A subsequent audit and exhibits in this proceeding made adjustments for additions and betterments and projected the amount to the end of the 1924 license. The amounts of the contributions by Vista and its predecessor are deducted from the amount of the plant in service because Section 3(13) provides, "The term 'cost' . . . shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others. . . ."

¹⁰(a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created.

be utilized for business purposes or distributed to the owners of the business. Depreciation is shown on a balance sheet as an offset to the assets of the business. But the definition of "net investment" in Section 3(13) incorporates concepts that were embodied within the 1914 system of accounts of the Interstate Commerce Commission, which concepts have long since been abandoned. Depreciation was then regarded as a charge against earnings which had to be set aside in a fund or funds for the eventual replacement of the depreciated assets. And it was shown on a balance sheet as a liability.

During the hearings and debates on the Federal Water Power Act, Congress was confronted with the interacting problems of (1) protecting the public against excessive profits by licensees who would utilize the lands and waters of the United States to generate electric power, and (2) allowing sufficient profits to provide incentives for constructing and financing water power projects. Congress chose to leave the regulation of electric rates to the States and, therefore, approached both problems through the regulation of profits. That regulation was embodied in the "net investment" concept which, in its simplest terms, would assure a return of investment through profits to the extent earned, and through a payment at or after the end of the term of the license to the extent that the investment was not previously recovered through profits. "After long negotiation and many conferences, representatives of the largest operating companies and of the leading investment bankers have agreed that the cost basis as above stated will be satisfactory from an investment standpoint, that money for development can be secured, if such basis is expressed in definite language in the bill." O.C. Merrill's Memorandum to the Secretary, 42

FPC, at 345.¹¹

As explained by the Commission, 40 FPC, at 941,

[T]he rather complex formula of Section 3(13) was primarily intended to assure that a licensee whose project was taken over, by the United States or by a new licensee, would recover, either through project revenues during the term of its license or through a payment of a "net investment" charge upon recapture, the original cost of the project, plus a fair return on such investment, if earned, and that with certain limitations, all amounts earned by the project in excess of such a fair return would go to reduce net investment.¹²

On January 20, 1966, the Commission initiated a rule-making proceeding to establish a method for determining the net investment in a project. And, in Order No. 370, issued September 27, 1968 (40 FPC 938), a divided Commission prescribed such a rule. However, in Order No. 370-A, issued November 22, 1968 (40 FPC 1351), the Commission granted rehearing for further consideration. And in Order No. 387, issued August 4, 1969 (42 FPC 329), the Commission vacated Order Nos. 370 and 370-A and substituted a statement of policy focusing on Section 10(d) of the Federal Power Act, which was amended, among other

¹¹O.C. Merrill continued, 42 FPC, at 346,

More time has been spent upon the one paragraph defining "net investment" than on all the rest of the bill. This paragraph was recognized as the foundation upon which the whole structure rested. Every word has been examined with the greatest care. It has been passed upon by the best legal, banking and accounting talent that could be secured, and has been accepted as satisfactory and as clearly defining the basis of compensation.

Judging from the legislative history of the Act of August 15, 1953 (Opinion No. 36, at 75 (Footnote 106)), the net investment concept failed to provide sufficient incentives for financing State and municipal water power projects.

¹²Section 15(a) expressly makes the net investment formula applicable, additionally, to the issuance of new licenses to new licensees.

provisions, in 1968.

We are therefore required by Section 14(a) to determine Mutual's net investment in Project No. 176 under outdated accounting principles which are embodied in the Federal Power Act and in the light of the inability of a prior Commission to agree upon a method for determining net investment, and the recommendations of some of those Commissioners that the matter is one for Congress. And we are required to determine these matters under a statutory provision which appears to have been designed for a profit-making entity, rather than a not-for-profit entity, such as Mutual.

While Congress said that the three items should be deducted to the extent they are accumulated from earnings in excess of a fair return on the licensee's investment, it did not specify how to compute "earnings" or how to determine "fair return". Accordingly we believe we have the latitude to choose methods that will produce reasonable results consistent with the dual objectives of Congress in designing Sections 3(13) and 14(a).

In the case of a not-for-profit entity, such as Mutual, we do not ordinarily think in terms of "earnings" since the shareholder-customers of the enterprise are supposed to be assessed amounts which exactly equal the expenses of the enterprise, resulting in neither profit nor loss.¹³ But its shareholder-members who utilize its products would realize benefits measured by the difference between the amounts of their assessments paid to the not-for-profit enterprise, and the amounts they would have to pay to a profit-making entity for the same products. When a not-for-profit entity is operated successfully over a long period of time, as in the case

¹³In practicable application, the assessments paid to the entity would probably be somewhat higher to cover contingencies.

of Mutual, it is reasonable, in our opinion, to treat the continuing benefit of lower product prices as the "fair return" to the shareholder-customers of the enterprise. Numerically, it would be represented by a "fair return" of zero.

If the not-for-profit entity depreciates its assets, it will under current accounting practices produce a cash flow which can be used to reduce the assessments paid by its shareholder-customers. In that case, its shareholder-customers will recover their investments (except for scrap values) over the lives of the assets; depreciation reserves equalling the costs (minus scrap values) of the assets will come into existence, and the "net investment" (cost minus depreciation) will be zero. If, on the other hand, the depreciation is earmarked for a replacement fund, there will be no reduction in the assessment payments of the entity's shareholder-customers. Instead, a replacement fund equal in amount to the depreciation will come into existence, creating a new asset, and the "net investment" (cost plus the replacement fund minus depreciation) will equal the cost, which must be distributed to the shareholder-customers of the entity who would thereby recover their investments.

While today we do not think in terms of the "earnings" of a not-for-profit entity, the 1914 system of accounts of the Interstate Commerce Commission treated depreciation as accumulated from earnings. In this context, if the continuing benefit of the lower product prices of a not-for-profit entity is treated as a zero "fair return" on the investment in that enterprise, and if the depreciation of that entity's assets is treated as accumulated from the "earnings" of that enterprise, then the depreciation would represent "earnings in excess of a fair return" within the purview of Section 3(13) of the Federal Power Act. That is the approach of the staff witness, who attempted to comply with Order No. 387

while carrying out the Congressional objective of assuring the recovery of the investment, to the extent earned, and providing for the recovery of any balance of the investment in the event of takeover or the issuance of a license to a new licensee. We find his approach reasonable and therefore approve it.

Mutual, Escondido and Vista rely on Section 10(d) which provides,

That after the first twenty years of operation [,] out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the *actual, legitimate* [net] investment of a licensee in any project or projects under license [,] the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the [C]ommission, be held until the termination of the license or applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. [For any new license issued under section 15, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.]¹⁴

Mutual, Escondido and Vista equate the term "reasonable rate of return" in Section 10(d) to the term "fair return" in Section 3(13). Accordingly, they applied the rates set forth in Article 20 of Mutual's 1920 license and computed what they claim to be a "fair return" for the purpose of Section 3(13). Our difficulty with their approach arises from the fact that Section 3(13) defines the term "net investment" which is a component of the price paid by the United States

¹⁴The underscored parts were in the Federal Water Power Act and have been deleted. The bracketed parts were not in that Act and have been added by later legislation.

or a new licensee as specified in Sections 14(a) and 15(a); but Section 10(d) requires a licensee to reserve a portion of its earnings and to remove them from being available for dividends. The Commission said, in this connection, 42 FPC, at 333, that Section 10(d)

requires the setting aside of a proportion of surplus earnings in excess of a "specified reasonable *rate of return*" which is to be set forth in the license. And this specified rate of return is contrasted with "fair return" as mentioned in Section 3(13).

While we reject their approach because we think it confuses two different matters, we note that it treats Mutual as a profit-making entity without making any allowance for the fact that Mutual's not-for-profit status explains why it has not recovered its investment through the years through either distributions or accumulations of earnings, as we commonly think of earnings. Our analysis for a profit-making entity would be the same as for a not-for-profit entity, with the exception that payments to the enterprise (called revenues, rather than assessments) would be increased by an element representing profit, and the further exception that such revenues would be derived from persons who are not necessarily shareholders, and would be distributed in the form of earnings (rather than non-cash benefits), necessitating computations of "earnings" and a "fair return" in terms of dollars. While we understand and appreciate that Mutual, Escondido and Vista are attempting to apply the net investment formula, we believe that their approach to Mutual's status as a not-for-profit entity results in an understatement of its "earnings" and produces an unjust result.

After it is determined that a licensee has had earnings equaling a fair return on investment, the existence and extent of any additional or excess earnings represented by the three items must be determined. In this connection, the staff wit-

ness determined (a) that there was no unappropriated surplus, (b) that the aggregate credit balances of current depreciation accounts, projected to the expiration date of Mutual's 1924 license, equalled the amount of the investment¹⁵, and (c) that there were no appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments for other specified purposes.¹⁶ Therefore, he deducted the amount of the depreciation from the amount of the investment and determined that the "net investments" was zero.

We approve and adopt his approach and result and conclude that the "net investment" in Project No. 176 as of June 24, 1974, was zero.¹⁷

¹⁵We reject Mutual's, Escondido's and Vista's argument that the net investment cannot equal zero when the investment includes non-depreciable land or properties that are not fully depreciated. Net investment is not an application of depreciation to specific properties; it is not an offset of depreciation to assets, as on current-day balance sheets. Net investment is a general measure of the return through earnings of a licensee's investment in properties. Land and other properties can obviously produce earnings, and a licensee's investment in land and other properties can obviously be recovered through earnings even though the land is not depreciable and the properties are not fully depreciated.

Similarly, we reject their argument that the amount of depreciation to be deducted from the sum of the actual legitimate original cost and the similar cost of additions and betterments, should not include the depreciation applicable to the contributions of Vista and its predecessor, which are required by Section 3(13) to be deducted from the plant in service. Under the accounting concepts here involved, depreciation represents a recovery of investment through earnings rather than an offset against assets. In other words, the depreciation on those contributions is part of the total earnings of Mutual.

¹⁶Utilizing Article 20 of Mutual's 1924 license, the staff witness calculated that Mutual could have earned \$383,940 beginning with the 21st year of its license before it would have been required by Section 10(d) to establish amortization reserves, and that Mutual was not required to establish such reserves since it earned (received excess assessments of) only \$115,493.

¹⁷Opinion No. 36 discusses (at 25-26) Escondido's efforts, beginning in 1963, to acquire Mutual's assets, first by purchase, then by condemnation, and finally by a tender offer for Mutual's stock, and the efforts of others (including the Bands) blocking Escondido. While Mutual's "net investment" in Project No. 176 is zero, Escondido would be entitled by reason of the Act of August 15, 1953, to receive just compensation if today it had replaced Mutual as the licensee of Project No. 176 under the old license.

Fair Value

The United States or a new licensee is required to pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken. Since we can assume that the property which might be taken has some value, and since we have determined that the net investment is zero, Mutual's net investment in Project No. 176 does not exceed its fair value.

Severance Damages

In addition to the net investment not to exceed the fair value of the property taken, the United States or a new licensee is required to pay

such reasonable damages, if any, to property of the licensee valuable [and] serviceable [in the development, transmission, or distribution of power] and dependent [for its usefulness upon the continuance of the license] but not taken, as may be caused by the severance therefrom of property taken. . . .

Severance damages are those suffered by the remaining electric utility properties of the licensee; if all of the properties of the licensee are taken, there can be no severance damages. Furthermore, the damaged properties must be dependent for their usefulness upon the continuance of the license; if the remaining properties are as useful after the other properties are taken as before, there are no severance damages.

Since severance damages are limited by Section 14(a) to *electric* utility properties, we reject Mutual's, Escondido's and Vista's claim for severance damages to their *water* utility properties. Furthermore, we agree with the Commission staff's, Interior's and the Bands' position that there will be no severance damages if all of the works of Project No. 176 that are subject to the 1924 license, as amended,

are taken.

However, as indicated in Opinion No. 36, at 31, Interior requested the Commission in 1972 to recommend that the United States take over the portion of Project No. 176 from the diversion works on the San Luis Rey River to the point of discharge into Lake Wohlford, which would permit the Commission to relicense the portion of Project No. 176 downstream from the point of discharge into Lake Wohlford. While it is not clear whether Interior still favors such a plan, we would observe that such a partial takeover could result in severance damages to Mutual's Bear Valley electric properties. And, Section 14(a) notwithstanding, we are unable to determine the amount because a record was not developed for that purpose.

Contracts

In addition to the net investment not to exceed the fair value of the property taken, plus severance damages, the United States or a new licensee is required to "assume all contracts entered into by the licensee with the approval of the Commission." The only contracts that require the approval of the Commission and, consequently, must be assumed by the United States or a new licensee, are those specified in Section 22 of the Federal Power Act for the sale and delivery of power for periods extending beyond the termination of the license. The only contract involved herein that purports to sell power beyond the term of Mutual's 1924 license is the agreement of February 2, 1914, which, among other matters, provides for the sale and delivery of power to the Rincon Band for an indefinite period of time. While that contract obviously predated the Federal Water Power Act and could not have been "entered into . . . with the approval of the Commission", it was not thereafter approved by the Commission and, therefore, the

United States or a new licensee is not required by Section 14(a) to assume the obligation to continue to sell and deliver power to the Rincon Band.¹⁸

Constitutionality

We address last Mutual's, Escondido's and Vista's threshold challenge to the constitutionality of Section 14(a) if it is decided that Mutual's net investment is zero. And we reject their challenge because Section 6 of the Federal Water Power Act provided, as does Section 6 of the Federal Power Act, that "Each . . . license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act. . . ." Mutual accepted its 1924 license, including all of the terms of the Federal Water Power Act.

The hearings and debates on the Federal Water Power Act took place during the period of post-World War I inflation which was thought to be a cyclical and temporary matter, to be followed by depression. In such an atmosphere, those who wanted to protect utility investments from being eroded by deflation became proponents of a "net investment" takeover price and opponents of a "fair value" takeover price. See 42 FPC, at 334. The fact that there has been near continuous inflation in the 59 years since the passage of the Federal Water Power Act, with the notable exception of the depression of the 1930's, does not make Section 14(a) unconstitutional because licensees would have fared better

¹⁸It should be noted, on the other hand, that Article 34 of the new license for Project No. 176 requires the Licensees to use their best efforts to fulfill their valid contractual obligation to supply electric power to the Rincon Indian Reservation. On September 11, 1979, the United States District Court for the Southern District of California decided that certain aspects of the agreement of February 2, 1914, are void, including the alienation of 1.72 acres of the Rincon Indian Reservation for the Rincon power plant. The Court did not address the obligation to supply electric power to the Rincon Indian Reservation, and its decision is not final.

with a "fair value" standard. Section 14(a), in conjunction with Section 3(13), sought to assure the recovery of a licensee's investment, not to exceed the fair value of the property taken, either during the term of a license or at or after its expiration. Notwithstanding the many difficulties of interpretation and administration, we believe that it achieves that result.

On the other hand, situations in which project works are owned in part by "persons" and "corporations" that are subject to the Section 14(a) takeover formula, and in part by "States" and "municipalities" that are not subject to that formula because of the Act of August 15, 1953, produce results that can be awkward and difficult to justify. If the United States takes over all of Project No. 176, it will, in effect, pay nothing for Mutual's undivided interest in the outflow pipe from Lake Wohlford, and just compensation for Vista's undivided interest in the same facility. Under all of the circumstances discussed in this part of this Opinion and order, we stand ready to assist Congress if it chooses to take a fresh look at the question of the price to be paid by the United States or a new licensee for the property taken.

CERTAIN ERRORS CLAIMED BY THE BANDS AND INTERIOR

Federal Land Policy and Management Act of 1976

The Bands claim that we erred in issuing a new license for Project No. 176 which does not require the Licensees to obtain rights-of-way pursuant to the Federal Land Policy and Management Act of 1976 (Land Policy Act), particularly 43 U.S.C. § 1761(a)(4) (Opinion No. 36, at 40), through the government non-Indian¹⁹ lands utilized by the

¹⁹The Land Policy Act defines the term "right-of-way" in 43 U.S.C. § 1702(f) as including "an easement, lease, permit, or license to occupy, use, or traverse public lands", and defines the term "public lands" in 43 U.S.C. § 1702(e) as excluding "land held for the benefit of Indians. . . ." Accordingly, there are no apparent Indian-related obstacles to the Licensees' obtaining the rights-of-way in question.

project. Interior claims that the license is void until the rights-of-way required by the Land Policy Act are obtained. The Licensees contend, on the other hand, that they don't have to obtain rights-of-way under the Land Policy Act because they already have valid rights-of-way which are not terminated by that Act.

It is clear that the Federal Water Power Act since 1920, and Part I of the Federal Power Act since 1935, have given Commission licensees authority to occupy and utilize government non-Indian lands for the purpose of constructing, operating and maintaining licensed project works. It is equally clear that the Commission's authority to authorize the use, occupancy and enjoyment of such lands in conjunction with licensed water power projects has been *exclusive* and, therefore, it has not been necessary to include conditions in licenses requiring Commission licensees to obtain similar authority for such lands from the Secretaries of Agriculture or of the Interior.

Sections 705 and 706 of the Land Policy Act repeal numerous laws relating to the administration of public lands and to rights-of-ways, but the Federal Power Act is not listed among those laws. Indeed, the savings provision of the Land Policy Act (43 U.S.C. § 1701(f)) expressly provides that "Nothing in this Act shall be deemed to repeal any existing law by implication." And it also provides (43 U.S.C. § 1701(g)) that

Nothing in this Act shall be construed —

* * *

(4) as superseding, modifying, or repealing, except as specifically set forth in this Act, existing law applicable to the various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto. . . .

Considering —

It has always been understood that the principle purpose of the Federal Water Power Act of 1920 was to establish a national policy to promote the comprehensive development of water power on government lands and navigable waters other than by the government itself, and that such policy would be administered by abolishing the piecemeal authorities of the Secretaries of the Interior, Agriculture and War over the nation's hydro-electric resources and centralizing them in the Federal Power Commission.²⁰

— it is inconceivable that in 1976 Congress, *sub silentio*, reimposed a duplicate system of federal authority over water power development. 43 U.S.C. § 1761(a)(4), which requires rights-of-way permittees of the Secretaries of Agriculture and the Interior to “also comply with all *applicable* requirements of the Federal Power Commission under the Federal Power Act of 1935” [Emphasis added], should be construed as being limited to Part II of the Federal Power Act which was newly enacted in 1935.

In any event, we do not agree that the new license for Project No. 176 is void until the Licensees obtain rights-of-way from Interior. While we also do not agree that the Licensees have to obtain such rights-of-way, at best, 43 U.S.C. § 1761(a)(4) requires them to obtain a second authorization. And if it does, it is not necessary to condition the license to require them to comply with that statute.

Article 5 of Forms L-16 and L-20 (October 1975), which is typical of the Commission's standard license conditions and is part of the new licenses for Project Nos. 176 and 559, routinely allows licensees five years from the date of

²⁰Opinion No. 36, at 36. Derived from *Montana Power Company v. Federal Power Commission*, 445 F.2d 739 (C.A.D.C., 1970), at 750.

the issuance of a license to obtain title to, or the right to use, whatever non-government lands are necessary or appropriate to enable them to construct, operate and maintain the licensed project works. We know of no reason why the Licensees of Project No. 176 shouldn't be allowed the same or a similar period of time to obtain a second authorization from Interior, if one is necessary, particularly since Interior has not indicated that the Licensees cannot obtain any rights-of-way that may be necessary or appropriate to enable them to construct, operate and maintain the licensed project works. Hopefully, the question of exclusive or duplicate federal authority will be resolved by that time.

"Reservation" of Water Rights

The Bands and Interior contend that we erred in failing to extend the protection of the first proviso of Section 4(e) of the Federal Water Power Act — that is, make the interference/inconsistency finding, and apply Interior's conditions — to the Pala and Pauma (including the Yuima) Indian Reservations. They point out, correctly, that the term "reservations" is defined in Section 3(2) of the Federal Power Act as including "interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation", and, also, "interests in lands acquired and held for any public purposes". And they argue that the Bands' reserved water rights, including in particular the reserved water rights of the Pala and Pauma Bands, are "interests in lands" within the purview of Section 3(2) and, consequently, that such reserved water rights are "reservations" which are subject to the protection of Section 4(e).²¹

²¹Their argument is the same as or similar to one which was raised in Opinion No. 2 (*Puget Sound Power and Light Company*, Project No. 2494), issued October 28, 1977, and not reached or addressed by the Commission.

The first proviso of Section 4(e) states that "licenses shall be issued within any reservation" only after the specified finding by the Commission, and shall be subject to and contain the specified conditions. No one contends that the first proviso of Section 4(e) should be taken literally — that it applies when the members of the Commission vote upon the issuance of a license when they are physically within a reservation. Such an absurd construction prompts a rational interpretation. And since the issuance of a license is the Commission's authorization to construct, operate and maintain project works, we have construed the first proviso of Section 4(e) to mean

That the Commission shall license the construction, operation and maintenance of project works within any reservation only after finding that the construction, operation and maintenance of the works will not interfere or be inconsistent with the purpose for which such reservation was created or acquired.

The Bands argue that project works proposed to be constructed on non-navigable water and *affecting* reservations are required by Section 23(b) of the Federal Power Act to be licensed and, consequently, that a license *affecting* a reservation is a license "within" a reservation within the purview of the first proviso of Section 4(e). But if that were so, there would seem to be no need for the provision in the first sentence of Section 23(b) that project works proposed to be constructed "*upon* any part of the . . . reservations of the United States" (emphasis added) are required to be licensed, for project works which affect reservations certainly include those which are constructed upon reservations. We believe that the word "within" and the phrase "upon any part of the . . . reservations" are used in the statutory provisions in contexts of physical areas. And we conclude that while the first proviso of Section 4(e) applies

to "reservations" in their physical context as defined in Section 3(2), it does not apply to "reservations" in the non-physical sense advocated by the Bands and Interior.

Diversions of Water (Article 29) Motion to Reopen Record

The Bands and Interior complain that Article 29 of the new license for Project No. 176, which provides for diversions of water to the Indian Service Area, does not preclude the license from interfering or being inconsistent with the purpose for which the La Jolla, Rincon and San Pasqual Indian Reservations were created. Because the plan for diversions of water which is embodied in Article 29 was first promulgated in Opinion No. 36, they filed a motion to reopen the record to scrutinize the plan, together with an affidavit which enumerates asserted deficiencies in the plan.

Many of the deficiencies enumerated in the affidavit and the Bands' and Interior's applications for rehearing are the result of their failure to comprehend that the first proviso of Section 4(e) does not require that adequate supplies of water be furnished to the three reservations if such supplies do not otherwise exist, as during dry summer periods. It requires only that the new license for Project No. 176 may not interfere or be inconsistent with those supplies. However, the practicable way to avoid interference or inconsistency is to furnish sufficient water to offset possible adverse effects of a project on existing water supplies. And the fact that the water which is so furnished may be less than an ideal supply does not require a conclusion that the supply fails to preclude interference or inconsistency.

We are, of course, aware of the fact that the plan for diversions of water which is embodied in Article 29 was not scrutinized on the record. It is our plan, designed to condition the project to meet the standard of Section 10(a), including water for dry summer periods. We are also aware

of the fact that the different parts of the Indian Service Area along the Escondido Canal have no storage facilities and that the Licensees' service areas below the Escondido Canal have storage as well as distribution facilities. Accordingly, we provided in Article 27 for the filing of a permanent water operating plan for Project No. 176 under which the comprehensive plan adopted in Opinion No. 36 will be refined to maximize its benefits and minimize its liabilities. But, as the Bands and Interior point out, we did not state explicitly in Article 27 that the permanent water operating plan shall consider the water needs of the Indian Service Area as well as the service areas of the Licensees. While we believe that is implicit in Article 27, we are modifying it to so provide.²²

Upon consideration of the asserted deficiencies in the plan for diversions of water which is embodied in Article 29, we see no need to reopen the record at this time to consider those deficiencies and, therefore, we will deny the Bands' and Interior's motion.²³ Details of the plan for diversions of water can be clarified in conjunction with our consideration of the permanent water operating plan.

The Licensees can close the Escondido Canal pursuant to Article 29 only for scheduled maintenance and scheduled and unscheduled repairs, or other prudent reasons. We contemplate that all closing will be for the shortest practicable times and the shortest practicable distances along the conduit. Flexibility for "other prudent reasons" is essential, but the Bands should not be alarmed since the permanent water operating plan must consider the needs of the Indian

²²The permanent water operating plan should include a maintenance schedule which is consistent with those water needs.

²³The affidavit attached to their motion has become part of the record because it was filed as part of their motion and, therefore, there is no need to act on their further request that it be added to the record.

Service Area.

Article 29 does not preclude recharging the Pauma Basin (which underlies both the Rincon and Pauma Indian Reservations) incidental to irrigating the Rincon Indian Reservation. We said in Opinion No. 36, at 114, that water cannot be released "solely for the purpose of recharging the Pauma and Pala Basins," and at 150, that irrigation of the Rincon Indian Reservation principally for the purpose of recharging the Pauma Basin is prohibited. In other words, recharging per se, and over-watering for recharging, are prohibited. But, as indicated, recharging incidental to irrigating the Rincon Indian Reservation is permitted.

The possible redesignation of the Indian Service Area and imposition of limits upon volumes or flows in conjunction with or following the final disposition of the pending litigation involving the water and related contractual rights which are incident to Project No. 176 (Opinion No. 36, at 146 (Footnotes 191 and 192)), is intended to be consistent with the final disposition of that litigation. Any question of priorities can also be resolved at that time. While the Director of the Division of Licensed Projects, Office of Electric Power regulation, or that officer's Deputy, would be required to exercise his judgment in passing upon the plans and specifications for diversion facilities, he would also be required to authorize diversions of water whenever he finds that the requested volumes and flows "can be . . . utilized for domestic, agricultural, stockwatering or small commercial consumption within the Indian Service Area" within a reasonably foreseeable period.²⁴

²⁴Among the considerations for including the particular portions of the San Pasqual Indian Reservation within the Indian Service Area, the eastern portion is largely irrigable and has no substantial source of water other than the Escondido Canal, the southwestern portion is largely non-irrigable, and the northwestern portion is largely irrigable and has a substantial source of water other than from the Escondido Canal.

Mission Indian Relief Act

The Memorandum of Decision of the United States District Court for the Southern District of California dated September 11, 1979, states that the Mission Indian Relief Act (MIRA)

was a comprehensive effort on the part of Congress to address thoroughly the problem of securing and preserving reservation lands for the Mission Indians. Because Congress did attempt to deal with the issue of Mission Indian lands in a comprehensive fashion, it is proper to view MIRA as embracing all of the procedures that Congress intended to be implemented with respect to those lands. Accordingly, in regard to agreements pertaining to the conveyance of water across reservation lands, § 8 [Opinion No. 36, at 28 (Footnote 47)] should be viewed as completely satisfying the safeguards that Congress meant to provide for the Indian lands in question here.

The Decision also states that, as a result, Section 8 controls over Section 946 (of another statute which is not relevant here) "as the exclusive means of granting canal rights of way across Mission Indian Reservations."

The Court held that the agreement of June 4, 1894 (Opinion No. 36, at 9), is valid under Section 8 insofar as it permits the diversion of San Luis Rey water into the Escondido Canal and grants a right-of-way across the La Jolla Indian Reservation. The Court also held that the agreement of June 4, 1894, is void under Section 8 as to the Rincon Indian Reservation because the Rincon Band was not a party to the agreement, and that the Interior-granted 1908 rights-of-way across the three reservations utilized by the Escondido Canal are void under Section 8 because the La Jolla and Rincon Bands (who received patents in 1892) were not parties, and because Interior failed to condition the right-

of-way across the San Pasqual Indian Reservation (which was not patented until 1910) upon the supply of sufficient water to the San Pasqual Band.

The Bands contend that Section 8 concerns rights-of-way for the conveyance of water, and that we have taken too narrow a view by focusing on the language pertaining to the construction of appliances for the conveyance of water, which is equivalent to the granting of the rights-of-way. They say,

Limiting Section 8 to new construction activities so as to preclude its application to the issuance or renewals of rights of way would be contrary to the legislative purpose.

They argue that the Escondido Canal has been changed in many ways through the years without contracts with the Bands or Interior's approval,²⁵ and that Section 6 of the Federal Power Act precludes the Commission from granting a perpetual right to utilize the rights-of-way.

Section 8 of MIRA does not impose any time limits on rights-of-way through Mission Indian reservations, except insofar as such limits might be included in the terms of any contracts or Interior's authorizations or approvals; and the agreement of June 4, 1894, does not place any such time limits on the La Jolla Band's authorizations of the Escondido Canal through their reservation. While we can authorize the utilization under the Federal Power Act of those Indian lands for a maximum period of 50 years, subject to additional periods under annual licenses, we see no legal basis for the Bands' claim that they can renew their 1894 authorization

²⁵Section 8 of MIRA provides that a person desiring to construct an appliance for the conveyance of water through a reservation must obtain Interior's authorization prior to the issuance of a patent for the reservation, or enter into an Interior-approved contract with the Indians of the reservation after the issuance of such a patent.

at the same time. The La Jolla Band has granted, with Interior's approval, a *perpetual* authorization for the Escondido Canal through the La Jolla Indian Reservation and its desire now, with the other Bands, to be left to its own devices to "obtain much more favorable rental and water supply terms than are contained in the Commission's new license" (Application for Rehearing, at 33), in the face of an expired license and immovable facilities, appears to be the reason for the Bands' opposition to the new license.

Insofar as Section 8 of MIRA addresses the possible new construction on the San Pasqual Indian Reservation, Article 32 of the new license for Project No. 176 requires the Licensees to use their best efforts to negotiate a reasonable contract with the San Pasqual Band and to obtain Interior's approval.²⁶ However, Opinion No. 36 attempts to balance the bargaining positions of the Licensees, and the Bands and Interior, by indicating, at 120a, that there are certain alternatives to the construction and the contract.

If the Licensees do not have valid Interior- or Band-granted rights-of-way through the Rincon and San Pasqual Indian Reservations, and if they are unable to negotiate reasonable agreements for such rights-of-way with the affected Bands and obtain Interior's approval under conditions which are satisfactory to this Commission, Section 8 of MIRA, preserving the integrity of Mission Indian lands, and the Federal Power Act, establishing a national policy to promote the comprehensive development of water power on government lands and navigable waters, will come into di-

²⁶The rights conferred on the Bands by relevant treaties and laws "must be assessed, as required by Section 4(e), as a precondition to issuance of any long-term license affecting the Band's tribal lands." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Commission*, 510 F.2d 198 (CA9, 1975), at 212. We believe that we have met our responsibility under MIRA if Section 8 is applicable.

rect confrontation.

In January 1891 Congress addressed the matter of constructing appliances and granting rights-of-way for the conveyance of water through Mission Indian lands. Almost 30 years later, in June 1920, Congress addressed the matter of licensing the construction, operation and maintenance of facilities for the development of electric power on government lands, including Indian lands, and navigable waters. The latter statute gives the Commission power to authorize the use of Indian lands for water conduits utilized in conjunction with the development of water power, and the question is whether the Commission can grant such authorization with respect to Mission Indian lands if the Licensees cannot obtain a right-of-way under the Mission Indian Relief Act. While we understand that implicit repeals are not favored, our position is that Section 29 of the Federal Power Act repeals Section 8 of the Mission Indian Relief Act to the extent of any inconsistency between them and, consequently, that the Commission may grant such authorization. The legislative history of, and the many court decisions interpreting, the Federal Water Power Act and Part I of the Federal Power Act, together with the specific authority over Indian lands granted in Section 4(e) of the Federal Power Act, persuade us that the comprehensive licensing scheme administered by the Commission applies to Mission Indian lands notwithstanding Section 8 of MIRA.

The irony is that the present controversy is over water and dollars, rather than the development of power and the integrity of Indian lands. The generation of electric power is and always has been incidental to the primary purpose of Project No. 176 of conveying water for domestic and irrigation consumption. And the physical intrusions on the reservations are minor, comprising 0.3% in the case of La Jolla, 0.7% in the case of Rincon, and 2.6% in the case of

San Pasqual (subject to reduction by possible new construction).²⁷ Accordingly, it appears that the power license and the integrity of Indian lands are pawns in the two-forum controversy over water and dollars, soon to enter the legislative forum of Congress.

Annual Charges (Article 30)

Opinion No. 36 states, at 158,

[T]he annual charges of one year will become operating expenses of Project No. 176 which will reduce the annual charges of the following year. The formula approach will reflect such rental expenses.

The Bands and Interior contend that the treatment of annual charges as operating expenses is contrary to *Montana Power Company v. Federal Power Commission*, 459 F.2d 863 (C.A.D.C., 1972), wherein the Court accepted the annual charges fixed by the Commission, stating at 870,

Under the profitability theory there would be a determination of the share of the total electric revenues of the Company attributable to Kerr, less the annual cost of producing power at Kerr, including a reasonable rate of return of the net investment of the Kerr facilities, but *not including in costs the rentals of the Tribal lands*. [Emphasis added.]

The term "annual charge" as used in Section 10(e) of the Federal Power Act means an annual rent or rental. From an accounting viewpoint, an annual charge is an operating expense which is treated in the same manner as other operating expenses. And the statement at 158 that "the annual charges . . . will become operating expenses of Project No.

²⁷This is not a case of destruction by flooding of a substantial part (22%) of an Indian reservation, as in the case of *Power Authority of the State of New York*, 21 FPC 146 (1946), which was ultimately reversed *sub nom Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

176" is correct.

Opinion No. 36 explains, at 170-172, the relationship between the "sharing of the net benefits" approach applied therein with respect to water benefits, and the "profitability" approach applied therein and in *Montana III, supra*, with respect to power benefits. When one is trying to determine a reasonable rental for tribal lands, it is appropriate under either approach to determine the "net benefits" or "profitability" of the enterprise without regard to the ultimate rental, thus excluding it from the costs used in the determination. Under the formula approach of Opinion No. 36, an annual charge for one year will be determined, billed and paid after the close of that year. Consistent with *Montana III, supra*, annual charges should not be included in the costs that are used for computing the Net Water Benefit. The statement at 158 that "the annual charges of one year will . . . reduce the annual charges of the following year" is not consistent with Article 30.

Article 30 of the new license for Project No. 176 allocates annual charges for the use, occupancy and enjoyment of tribal lands, ratably according to (1) the distance traversed by the Escondido Canal through those lands, and (2) the relative diversions of water to those lands. We believed, and still believe, that such an allocation formula is more equitable than the one proposed by the Bands and is the most equitable one that we could devise. Based on the present distances traversed by the Escondido Canal, 31.08% of the annual charge would be allocated to the La Jolla Band; 20.32%, to the Rincon Band; and 48.60%, to the San Pasqual Band. Those percentages would be adjusted annually, however, to reflect the relative diversions of water — so that the Band with the largest diversion (currently Rincon) will also have the largest adjustment. During the illustrative typical year (Opinion No. 36, at 198), 38.36%

of the annual charge would be credited to the La Jolla Band; 1.65%, to the Rincon Band; and 59.99%, to the San Pasqual Band.

The Bands state that they would prefer that the annual charges be allocated among them ratably according to the cost of rerouting the Escondido Canal around their respective reservations, which is their measure of the relative values of their lands to the Escondido Canal in particular and Project No. 176 generally. Under this approach, 58% of the annual charges would be credited to the La Jolla Band; 31%, to the Rincon Band; and 11% to the San Pasqual Band. The results in a typical year are shown in Footnote 33, *infra*.

Since the total amount of annual charges to be paid by the Licensees in any year would not be changed if the formula for allocating those charges among the Bands is changed, the Licensees would not be affected by such a change. Although we have no objection if the three Bands prefer such an arrangement, we choose for the reason discussed below to defer revising Article 30 of the new license for Project No. 176 to so change the allocation formula. Instead, we are adding a second paragraph to Article 28 to authorize our changing the allocation formula from time to time without obtaining the agreement of the Licensees.²⁸

Although the Bands have many interests in common against Mutual, Escondido and Vista, we are concerned over the fact that they have some interests which conflict with one another, and the further fact that some of the Bands

²⁸This new paragraph is added to Article 28 out of an excess of caution since such a change is not viewed as constituting an alteration of the license within the meaning of Section 6 of the Federal Power Act, that would require the agreement of the Licensees. See, e.g., *City of Holyoke*, Project Nos. 2863 and 2877, Order Denying Rehearing issued September 7, 1979 (mimeo at 4, n. 7).

have the same legal counsel. We mean to cast no aspersions against any attorney representing any of the Bands in this proceeding. We believe that the matter of allocating annual charges among the three Bands is one in which they have mutually conflicting interests and, consequently, may wish to have separate legal and other counsel to advise them as to what is in the best interest, of the particular Band. If, after having had an opportunity to obtain separate advice, the three Bands still agree that they prefer the cost-of-rerouting percentages, they can file a petition to that effect at or about the effective date of the license and we will so change the allocation formula, either with or without adjustment for the relative diversions of water, as they may prefer, or in any other manner in which they may agree.²⁹

In defining the term "Cost of Canal Water" for the purpose of Article 19 of Mutual's 1924 license (Opinion No. 36, at 232), we considered it important that Mutual's Project No. 176 and Vista's Henshaw development were operated as a single undertaking throughout the term of the license. Accordingly, we believe that the "Cost of Canal Water" properly includes that part of the cost of operating Vista's Henshaw development as Mutual's natural flow (4,143 acre-foot) bears to the total flow ("Net Canal Water" as measured leaving the Escondido Canal).

The Bands' challenge to "the Commission's formula for computing annual charges" (Application for Rehearing, at 65), is misleading and just plain wrong. We submit that that formula is "reasonable", as required by Section 10(e).³⁰

²⁹A similar change in Article 19 of Mutual's 1924 license can be effected at the same time or prior to the crediting of annual charges thereunder, whichever is more convenient.

³⁰Many of the figures in the discussion which follows are changed as a result of the Article 30 modifications which are discussed under "Annual Charges Under the 1979 License (Article 30)", *infra*. The Opinion No. 36 figures are retained in the discussion to respond meaningfully to the Bands' challenge.

Under that formula, the Net Water Benefit of Project No. 176 is computed, and a certain part of that Net Water Benefit — 9.29% — is allocated to the three Bands as the total annual charge for the use, occupancy and enjoyment of their tribal lands. Then, the total charge is allocated among the three Bands according to a second formula.

Under the second formula, tentative allocations of the annual charge are made according to the distance traversed by the Escondido Canal through the respective tribal lands. Those tentative allocations are then adjusted according to the relative diversions of water to those lands. In making those adjustments, the annual charge is recomputed on the hypothetical assumption that there are no diversions of water to the tribal lands. That recomputation does not change the amount of the annual charge that was already computed. The difference between the amount that was already computed and the recomputed amount is the amount by which an annual charge without diversions would have been reduced by the diversions to reach the actual annual charge, and that difference is the amount of the adjustment. The adjustment is then charged against the three Bands according to the relative diversions of water to their respective tribal lands.

In other words, the computation that is based on the assumption that the water is not diverted to the tribal lands is used to adjust an allocation of annual charges. And we submit that the Bands are challenging the second formula allocating and adjusting annual charges, rather than the formula for computing annual charges, as they claim.

The Bands are wrong in saying that if the Rincon Band's 1,427 acre-feet of water are not diverted in the typical year, "the total project net benefit attributable to that water is \$24,289 or \$17.02 per acre-foot." If the water is not diverted to tribal lands, 1,427 additional acre-feet would reach

Mutual and Vista, thereby increasing the Net Water Benefit of Project No. 176 by \$64,768 or \$45.38 per acre-foot.³¹ And of that amount, 37.5%, or \$24,289 would be allocated among the beneficial owners of the lands underlying the Escondido Canal and the Wohlford development. Of the latter amount, \$12,759, or 52.53%, would be allocated to the United States as the annual charge for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations; \$6,016, or 24.77%, would be allocated to the three Bands as the total annual charge for the use, occupancy and enjoyment of their tribal lands; and \$5,514, or 22.70%, would be treated as attributable to the owners of the remaining lands underlying the Escondido Canal and the Wohlford development, including Mutual.³²

A further aspect of the analysis is omitted by the Bands and illustrated in the following table with respect to the typical year:³³

³¹ Although the operating costs of Project No. 176 would not change if the water is not diverted, the Net Water Benefit would increase by \$64,768, representing the replacement cost of 803 acre-feet of Mutual's water at \$45.13 per acre-foot and 624 acre-feet of Vista's water at \$45.72 per acre-foot. (See Opinion No. 36, at 197 (Footnote 237), with respect to the allocation of acre-feet, and at 196, with respect to the cost of replacement water.) It is reasonable, therefore, that the total cost of \$45.38 per acre-foot should fall between the two individual costs, and could not possibly be the Bands' absurd figure of \$17.02.

³² The Net Water Benefit is the product of the interaction of all the lands and improvements comprising the project and, as a result, the Bands are entitled to an allocative share for their lands. It is meaningless to express an allocative share in terms of dollars or cents per acre-foot, and misleading to give the impression that the Bands are being cheated if they don't receive in annual charges the replacement value of the water they don't take. *Improvements and other lands* which contribute to the Net Water Benefit attributable to the water not taken by the bands are entitled to their allocative shares.

³³ The Bands' percentages, *supra*, would result in the following allocations (without adjustment for relative diversions):

	<u>With Diversion</u>	<u>Without Diversion</u>
La Jolla	\$14,892	\$18,381
Rincon	7,959	9,824
San Pasqual	2,824	3,486
Total	\$25,675	\$31,691

	Tentative	With Diversión Water Adjustment	Annual Charge	Without Diversión Annual Charge
La Jolla	\$ 9,849	- 0 -	\$ 9,849	\$ 9,849
Rincon	6,440	(\$6,016)	424	6,440
San Pasqual	15,402	- 0 -	15,402	15,402
Total	\$31,691	(\$6,916)	\$25,675	\$31,691

In the typical year the annual charges credited to the La Jolla and San Pasqual Bands would not be affected by the diversions of water to the Rincon Indian Reservation. If 1,427 acre-feet of water are diverted to that reservation, the Rincon Band will be credited with an annual charge of \$424. If, on the other hand, no water is diverted to that reservation, the Rincon Band will be credited with an annual charge of \$6,440, or an additional \$6,016, and not the \$1,286 claimed by the Bands.³⁴

Project No. 559

Opinion No. 36 states, at 180, that the principal function of SDG&E's Project No. 559 transmission line is to transmit power from the Rincon power house of Project No. 176 to SDG&E's Rincon Substation on the northern boundary of the Rincon Indian Reservation, at which point it interconnects with SDG&E's distribution system. Upon reconsid-

³⁴In other words, the Rincon Band would receive \$6,016 for 1,427 acre-feet of water, or \$4.22 per acre-foot, which is exactly equal to the Bands' 9.29% entitlement to the Net Water Benefit (Opinion No. 36, 9.29% entitlement to the Net Water Benefit (Opinion No. 36, at 168), applied to the cost of \$45.38 per acre-foot. Conversely, it would cost the Rincon Band \$6,016, or \$4.22 per acre-foot, if it chooses to utilize the water. These converse statements demonstrate the meaninglessness of expressing an allocative share in terms of dollars per acre-foot.

Contrary to the Bands' claim that diversions of water to the tribal lands "are automatically taken into account in the annual charge formula," diversions result in higher costs for each acre-foot of water received by Mutual and Vista, but do not result in higher operating costs for Project No. 176.

eration of the evidence, we have concluded that that statement and the description of the project lands in the new license for that project are not accurate.

Although the 12 kV transmission line in question transmits power approximately 2.4 miles from the Rincon power house to SDG&E's Rincon Substation, as indicated, it interconnects at Pole No. 12,111, approximately 0.6 miles from the Rincon power house, with SDG&E's 12 kV Circuit No. 216, which circuit is not shown on SDG&E's Exhibit J.³⁵ And the record indicates that the loads on that 12 kV transmission line between Pole No. 12,111 and the Rincon Substation are such that that segment of the line is not used primarily to transmit project power, but functions as part of SDG&E's distribution system. Accordingly, that segment of the line does not qualify as a primary transmission line licensable under the Federal Power Act. The licensable primary transmission line of Project No. 559 runs only from the Rincon power house to its point of junction with SDG&E's Circuit No. 216 at Pole No. 12,111. The description of the project lands in the new license for Project No. 559 is being revised accordingly, and Exhibit J, as required to be revised by that license, should show the interconnection with SDG&E's Circuit No. 216.

On the basis of a 40-foot wide and 2,992-foot long right-of-way (2.75 acres) and the maximum interest rate which

³⁵Although SDG&E's Exhibit J does not show its 12 kV Circuit No. 216, that exhibit does show SDG&E's 69 kV transmission line, which apparently parallels and shares the poles and right-of-way with Circuit No. 216 to Pole No. 12,111; does *not* interconnect with SDG&E's 12 kV transmission line at that pole; and shares the poles and right-of-way with that 12 kV transmission line from Pole No. 12,111 to SDG&E's Rincon Substation. That 69 kV transmission line was licensed as Project No. 490 to Pole No. 12,111 and as part of Project No. 559 from that pole to SDG&E's Rincon Substation. That line is no longer a primary transmission line and, as a result, the license for Project No. 490 was allowed to expire and the new license for Project No. 559 does not include it among the project works.

is applicable to 1979 (67/8%), the annual charge for the use, occupancy and enjoyment of the tribal lands of the Rincon Indian Reservation by the Project No. 559 transmission line would be \$14.18 for 1979, or about \$25 per mile.³⁶

CERTAIN ERRORS CLAIMED BY THE LICENSEES

Annual Charges Under the 1979 License (Article 30)

The Licensees contend that there are a number of errors in Opinion No. 36 associated with annual charges, and they are joined in part by the Bands and Interior who view the amount of charges payable to the United States as significantly reducing the amount payable to the Bands. Although the Licensees now indicate that \$20,000, rather than \$10,000, should be the upper limit of compensation, the Bands say that

the Indian lands should receive the full monetary benefit of the project's water conveyance function while Escondido-Vista continue to receive and utilize the water and to obtain the complete benefit of the project's other functions.

Considering all of their arguments, we are persuaded to modify Article 30 of the new license for Project No. 176 in such a manner that in the typical year discussed in Opinion No. 36 at 196-198, the annual charges for the use, occupancy and enjoyment of the tribal and non-tribal lands of the United States (other than the relatively small charges associated with the Henshaw development, the generation of electric power and communication and other services by wire) would be reduced from \$80,124, of which \$54,449 would have been payable to the United States and \$25,675

³⁶See 18 CFR § 11.21: 2.75 acres × \$150 per acre × .06875 × .5 = \$14.18.

would have been placed to the credit of the La Jolla, Rincon and San Pasqual Bands, to \$35,575, of which \$3,669 would be payable to the United States (for 1979) and \$31,906 would be placed to the credit of the three Bands. The modifications of Article 30 reduce the said annual charges payable by the Licensees from 28.99% of the Net Water Benefit of Project No. 176 to 12.87%, and increase the said annual charges creditable to the three Bands from 9.29% to 11.54%.

The Bands contend that Opinion No. 36 is arbitrary, at 161, in assigning to the owner of the lands and improvements comprising the Henshaw development (Vista) one-half of the economic value of the water attributable to that development, and in assigning the other one-half of the economic value to the owners of the lands and improvements comprising the Escondido Canal (principally Mutual, Vista, the United States and the Bands). The Licensees contend that the opinion errs, at 162, in concluding that one-half of the water flowing through the Escondido Canal is attributable to the Henshaw development, and that the other one-half is attributable to the natural flow of the San Luis Rey River. They say that the staff witness on whose testimony we relied was not testifying as to annual charges, but as to "the importance of Henshaw from a licensing standpoint", and that three-fourths of the water flowing through the Escondido Canal is attributable to the Henshaw development because at least that portion of the water originates above Henshaw Dam. And while the Licensees state that there is "no evidence in the record which specifically calculated the incremental value of Wohlford storage", they contend that Opinion No. 36 errs, at 166-167, in treating the Wohlford development as having only a conveyance function. The Bands claim, in this connection, that we undervalued the relative contribution of the storage function of the Wohlford development, but they point out they are not claiming any

annual charges for the storage benefits of the Henshaw and Wohlford developments (Opinion No. 36, at 153).

The interrelated arguments of the Licensees and the Bands persuade us to modify Article 30 in certain respects. Although the Bands say that they are not claiming annual charges for the storage benefits of the Henshaw and Wohlford developments, the fact is that the Escondido Canal probably would not exist if it weren't for the storage benefits of the Wohlford development, or a similar facility. Without storage somewhere, the usefulness of the Escondido Canal would be limited to the amount of water that can be diverted from the San Luis Rey River and consumed in Mutual's and Vista's service areas during the rainy winter months only. The storage benefits of the Henshaw and Wohlford developments contribute significantly to the total volume of water that passes through the Escondido Canal and, consequently, to the Net Water Benefit which is computed on that volume. The Bands are claiming annual charges for the conveyance through their reservations of water to be stored in the Wohlford development, as well as Henshaw-stored water, which together is all of the water that passes through the Escondido Canal. While the Bands may not be claiming annual charges for the storage benefits of the two developments, the conveyance benefits contributed by their reservations depend in large part upon the storage benefits of those developments. In any event, it is necessary to consider the relative contributions of Henshaw and Wohlford development storage to the Net Water Benefit of Project No. 176 in order to determine the relative contributions of Indian reservation conveyance to that Net Water Benefit.

The testimony of the staff witness, in the Licensees' words, as to "the importance of Henshaw from a licensing standpoint", is the only evidence in the record as to the relative importance of Henshaw development storage. Although 75%

or more of the natural flows of the San Luis Rey River at the diversion dam originate above Henshaw Dam, the origin of the flows (as being above or below that dam) is not a proper measure of the relative importance of Henshaw development storage since some of those flows would be diverted into the Escondido Canal if the Henshaw development did not exist. Accordingly, there is no error in the conclusion that the water flowing through the Escondido Canal is attributable equally to the Henshaw development and the natural flows of the San Luis Rey River.³⁷

When two factors, such as storage and conveyance, operate in succession upon a commodity, such as water, to produce an economic value, there may not be a precise way to measure the economic value attributable to each of those factors, as the Bands suggest. But in the absence of a suggestion of a better method of apportionment, and of measuring the relative contributions of the two factors, the assignment of one-half of that economic value to each of those factors is the fairest and most practicable and rational method of dividing that economic value between the two factors. Accordingly, we are persuaded that there is no error in the apportionment of the economic value of the Henshaw-stored water (50% of the Escondido Canal water) as between the lands and improvements comprising that development, and the lands and improvements comprising the Escondido Canal. But we are equally persuaded that there is error in not apportioning the economic value of Wohlford-stored water in the same manner.

As discussed in Opinion No. 36, at 165-168, we had great difficulty determining the relative importance of Wohl-

³⁷The parties are reminded, in this connection, that they may make such studies as they choose to measure the relative importance of the key facilities of Project No. 176 for the purpose of future readjustments of annual charges pursuant to Section 10(e) of the Federal Power Act.

ford development storage to the Net Water Benefit of Project No. 176. We said that the conveyance function of the Wohlford development is less important than the conveyance function of the Escondido Canal. We also said that the construction of Henshaw Dam and the availability of MWD water made the storage function of the Wohlford development less critical to a reliable water supply and, consequently, that we had difficulty perceiving how the Wohlford development makes more water available to the computation of the Net Water Benefit. Accordingly, we used the linear distance through the Wohlford development as the measure of its conveyance *and* storage functions.

The Bands point out, in this connection, that the capacity of the Escondido Canal is not large enough to convey, at the same time during the summer months of peak water demand, Mutual's natural flow water originating above the diversion dam, and Vista's stored water originating above Henshaw Dam. They say that, as a result, during the winter months the Escondido Canal conveys Mutual's natural flow water to the Wohlford development where it is stored for summer consumption, and during the summer months the Escondido Canal conveys Vista's Henshaw-stored water to that development where it is flowed-through for consumption. And they argue that the Wohlford development makes more water available to the computation of the Net Water Benefit in view of the limited capacity of the Escondido Canal.

We agree with their conclusion generally, but disagree insofar as it attributes the additional volumes to the Wohlford development *alone*. Rainfall throughout the San Luis Rey watershed and in nearby areas is virtually nonexistent during June, July, August and September and, as a result, there is little or no natural flow for conveyance through the Escondido Canal during those months. The Wohlford de-

velopment receives Mutual's natural flow water from the Escondido Canal during the winter months and stores it for summer consumption, which storage adds an economic value to that water which would not exist with the trans-basin conveyance alone. The fact that the Wohlford development is below the Escondido Canal makes it possible to utilize that canal for Vista's Henshaw-stored water during the summer months and, in that sense, the Wohlford development contributes *in conjunction with the Henshaw development* to the total volume of water utilized for computing the Net Water Benefit. In other words, both storage developments are required to realize the total volume of water and, consequently, the total Net Water Benefit.

As in the case of the Henshaw development storage followed by the Escondido Canal conveyance, the Escondido Canal conveyance followed by the Wohlford development storage operates in succession upon the natural flow water to produce an economic value, which will be apportioned equally between the conveyance and storage factors in the absence of a suggestion of a better method of apportionment and measurement. Accordingly, we are persuaded that the economic value of the natural flow water (50% of the Escondido Canal water) should be apportioned equally as between the lands and improvements comprising the Escondido Canal, and the lands and improvements comprising the Wohlford development. As a result, the allocation arrow (Appendix B to Opinion No. 36) should be modified to show 25% of the canal water, consisting of 50% of the natural flow water benefits assigned to conveyance, as being allocated among the owners of the lands and improvements associated with the Wohlford conveyance/storage function. As a further result, the allocation arrow should be modified to show 25%, rather than 37.5%, of the canal water, consisting of 50% of all water benefits assigned to conveyance,

as allocated to the owners of the lands associated with the conveyance function; and Article 30 is being modified to reflect that change.

When the formula for computing annual charges for the utilization of tribal lands as modified herein is reduced to its basics, 50% of the Net Water Benefit is assigned to the economic value of the storage of the water, wherever it occurs, and the other 50% of the Net Water Benefit is assigned to the economic value of the trans-basin conveyance of the water. Of the latter, 50% (25% of the Net Water Benefit) is treated as being attributable to the facilities associated with that conveyance, and the other 50% (25% of the Net Water Benefit) is treated as being attributable to the land associated therewith. Accordingly, the percentage of water flowing through the Escondido Canal as consisting of the natural flow the San Luis Rey River, rather than *Henshaw*-stored water, is immaterial.

Article 30 does not provide compensation to the United States in accordance with the formula in 18 CFR § 11.21(b) for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations.³⁸ Instead, it compensates the United States in the same manner as the Bands through an allocative share of the Net Water Benefit of Project No. 176.³⁹ As discussed at 164-164a, that amount was designed to preserve certain principles embodied within Article 30. The Licensees contend that our departure from 18 CFR § 11.21(b) in the circumstances of this case violates

³⁸For 1979 the United States would be paid an annual charge pursuant to 18 CFR § 11.21(b) of \$10.3125 per acre ($\$150 \text{ per acre} \times .06875$) on 174.76 acres within the Escondido Canal portion of the project area (Exhibit K-1 dated January 1975), or \$1,802, and on 181 acres within the Lake Wohlford portion of the project area, or \$1,867, making a total of \$3,669.

³⁹In a typical year the United States would be paid an annual charge pursuant to Article 30 of \$54,449 (Opinion No. 36, at 197).

certain principles of administrative due process and that any charges in excess of the amounts provided by 18 CFR § 11.21(b) would be inherently unreasonable. They are joined in the latter argument by the Bands and by Interior who contend that annual charges for non-tribal lands of the United States should be waived, or at least fixed under 18 CFR § 11.21(b).

Without passing on the merits of the respective arguments, we are modifying Article 30 to compensate the United States pursuant to 18 CFR § 11.21(b) for the use, occupancy and enjoyment of its non-tribal lands. Interior said in the past (Exhibit B-140) that the determination of annual charges for such lands is within our jurisdiction and that it would not object to the issuance of a license waiving such charges. Whether or not Interior thereby recommended a waiver, the parties have not called our attention to any persuasive reasons why annual charges for non-tribal lands of the United States should be waived pursuant to Section 10(i) of the Federal Power Act.

The problem to be avoided by compensation the United States through an allocative share of the Net Water Benefit, arises from the fact that such a share in a typical year is considerably higher than the annual charge computed under 18 CFR § 11.21(b). If the difference between the two amounts is allocated to the beneficial owners of the remaining lands associated with the trans-basin conveyance that contribute to the Net Water Benefit (the Bands and the Licensees), such owners would receive more than their allocative shares. But if the difference between the two amounts is *not* so allocated, then the owners of the improvements associated with the trans-basin conveyance that contribute to the Net Water Benefit (the Licensees) would retain more than their allocative shares. Although the problem would have been avoided by eliminating the differential, so that

all interested parties including the United States would receive their allocative shares, it now appears that essentially the same result can be reached by splitting the difference between the two amounts equally between the owners of the remaining lands and the owners of the improvements associated with the trans-basin conveyance that contribute to the Net Water Benefit.

Since Article 30 is being modified to allocate 25% of the Net Water Benefit of Project No. 176 to the owners of the lands and improvements comprising each of the Henshaw and Wohlford developments, it is appropriate to allot the difference between the Net Water Benefit attributable to the non-tribal lands of the United States associated with the trans-basin conveyance⁴⁰ and the annual charge for those lands computed under 18 CFR § 11.21(b)⁴¹, equally between the owners of the improvements and the owners of the remaining lands comprising the Escondido Canal portion of the project area. And it is appropriate to allocate the latter amount ratably among the owners of the remaining lands of that area according to the distance traversed by the Escondido Canal through those lands. Article 30 is being modified to so provide.

In the illustrative typical year, the Net Water Benefit of Project No. 176 will be \$276,412 (Opinion No. 36, at 196). Of that amount, \$69,103, or 25%, will be allocated to the owners of the lands and improvements comprising the Henshaw development, who are principally the Licensees.⁴² Of

⁴⁰The non-tribal lands of the United States comprise 56.96% of the Escondido Canal traverse. Thus, 56.96% of 25% of the Net Water Benefit of \$276,412, or \$39,361, would be attributable to such lands.

⁴¹\$1,802, per Footnote 38.

⁴²The Licensees will pay the United States a small annual charge for the small part of the Cleveland National Forest utilized by the Henshaw development.

the \$276,412, another \$69,103, or 25%, will be allocated to the owners of the lands and improvements comprising the Wohlford development, who are the Licensees and the United States.⁴³ A third \$69,103, or 25%, will be allocated to the owners of the improvements comprising the Escondido Canal, who are the Licensees. And the remaining \$69,103, or 25%, will be allocated to the beneficial owners of the lands utilized by the Escondido Canal. Of that amount, \$19,556, or 28.30%, will be allocated to the three Bands as the first part of the annual charge for the use, occupancy and enjoyment of their tribal lands by the Escondido Canal. But for the annual charge of \$1,802 (for 1979) payable to the United States under 18 CFR § 11.21(b), \$39,361, or 56.96% of the \$69,103, would otherwise be allocable to the United States for the use, occupancy and enjoyment of its lands utilized by the Escondido Canal other than tribal lands embraced within Indian reservations.

The annual charge payable to the United States under 18 CFR § 11.21(b) for the utilization of its non-tribal lands by the Escondido Canal, or \$1,802 (for 1979), will be deducted from the \$39,361 otherwise allocable to the United States for such utilization of those lands. And 50% of the difference of \$37,559, or \$18,779, will be allocated to the owners of the improvements comprising the Escondido Canal, who are the Licensees. The other 50%, or \$18,780, will be allocated to the beneficial owners of the remaining lands utilized by the Escondido Canal. Of that \$18,780, \$12,350, or 65.76%,⁴⁴ will be allocated to the three Bands as the

⁴³The Licensees will pay the United States an annual charge of \$1,867 for 1979 (see Footnote 38) for its non-tribal lands utilized by the Wohlford development.

⁴⁴When the non-tribal lands of the United States are eliminated from the traverse of the Escondido Canal, the 20,344-foot traverse on tribal lands represents 65.76% of the remaining 30,937-foot traverse. See Opinion No. 36, at 164.

second part of the annual charge for the use, occupancy and enjoyment of their tribal lands by the Escondido Canal. Accordingly, the total annual charge placed to the credit of the three Bands will be \$31,906, or 11.54% of the Net Water Benefit of Project No. 176.

Turning to the allocation of the annual charge among the three Bands, in the illustrative typical year the Gross Water Benefit of Project No. 176 will be \$341,180 without diversions of water to the Rincon Band (Opinion No. 36, at 197). Of that amount, \$85,295, or 25%, will be allocated to the beneficial owners of the lands utilized by the Escondido Canal. Of that amount, \$48,584, or 56.96%, would be allocable to the United States for the use, occupancy and enjoyment of its lands utilized by the Escondido Canal other than tribal lands embraced within Indian Reservations. And \$24,138, or 28.30%, will be allocated to the three Bands.

The annual charge of \$1,802 (for 1979) will be deducted from the \$48,584; and 50% of the difference of \$46,782, or \$23,391, will be allocated to the beneficial owners of the remaining lands utilized by the Escondido Canal. Of the latter amount, \$15,382, or 65.76%, will be allocated to the three Bands. Of the Bands' total allocation of \$39,520 (\$24,138 + \$15,382), tentatively \$12,283, or 31.08%, would be allocated to the La Jolla Band; \$8,030, or 20.32%, to the Rincon Band; and \$19,207, or 48.60%, to the San Pasqual Band.

The difference between the aggregate tentative credits of \$39,520 and the annual charge of \$31,906, or \$7,614, will be charged against the three Bands ratably according to the respective volumes of water diverted to their tribal lands. In the illustrative typical year, the entire \$7,614 will be deducted from the tentative credit of the Rincon Band since it will be the only one to receive water from the Escondido Canal. Accordingly, annual charges of \$12,283 will be cred-

ited to the La Jolla Band; \$416, to the Rincon Band; and \$19,207, to the San Pasqual Band.⁴⁵

Annual Charges Under the 1924 Licence (Article 19)

The Licensees call our attention to the fact that in adapting Article 30 of the 1979 license for Project No. 176 to Article 19 of the 1924 license, we would increase the annual charges payable for the use, occupancy and enjoyment of the non-tribal lands of the United States, and that such action is prohibited by 18 CFR § 11.21(e), which provides,

No licensee under a license issued prior to August 26, 1935, shall be required to pay annual charges in an amount greater than prescribed in such license, except as may be otherwise provided in the license.

While Section 10(e) of the Federal Power Act, since 1935, has authorized adjustments from time to time of annual charges for *non-tribal* lands of the United States, Section 10(e) of the Federal Water Power Act, prior to 1935, did not specifically authorize such adjustments. Accordingly, we agree with the Licensees and are modifying Ordering Paragraph (D) of Opinion No. 36 to eliminate the amendments to Article 19 of the 1924 license which would have increased the annual charges for the use, occupancy and enjoyment of the *non-tribal* lands of the United States.

⁴⁵Under the Bands' approach based on the cost of rerouting the Escondido Canal around their respective reservations, the annual charge of \$31,906 would be allocated among them as follows:

	<u>Per Cent</u>	<u>Without Diversion Adjustments</u>	<u>With Diversion Adjustments</u>
La Jolla	58	\$18,505	\$22,922
Rincon	31	9,891	4,637
San Pasqual	11	3,510	4,347
Total	100	\$31,906	\$31,906

On the other hand, Article 19 is expressly subject to Section 10(e), and that provision has always authorized adjustments from time to time of annual charges for *tribal* lands embraced within Indian reservations. Accordingly, 18 CFR § 11.21(e), which implements the statutory provision with respect to licenses issued before the 1935 amendment, does not preclude adjustments from time to time of annual charges for tribal lands (which, in turn, are governed by 18 CFR § 11.22).

In adapting Article 30 of the 1979 license to Article 19 of the 1924 license, we are including the changes made by this Opinion and order on rehearing. Since the Net Water Benefit under the 1924 license is designed to reflect Mutual's natural flow entitlement and to exclude Henshaw-impounded water, the economic value of the natural flow water (100% of the Escondido Canal water) is being apportioned equally as between the lands and improvements comprising the Wohlford development, and the lands and improvements comprising the Escondido Canal. And the latter is being apportioned equally as between the owners of the improvements comprising the Escondido Canal, and the owners of the lands utilized by the Escondido Canal. The 25% of the Net Water Benefit is allocated among the beneficial owners of the lands utilized by the Escondido Canal in the same manner as Article 30. The portion attributable to the non-tribal lands of the United States⁴⁶ is then allocated equally to the owners of the improvements and the owners of the remaining lands comprising the Es-

⁴⁶Unlike Article 30, Article 19 does not allocate the *difference* between the amount of the Net Water Benefit that is allocable to the non-tribal lands of the United States, and the annual charges for those lands. This is because the annual charges for such lands other than transmission line rights-of-way are only \$3.00 and are not specifically allocated as between the non-tribal lands utilized by the Escondido Canal and those utilized by the Wohlford development.

condido Canal, and the latter allocation is credited ratably among the owners of the remaining lands according to the distance traversed by the Escondido Canal through those lands.

If the illustrative typical year had been one under Mutual's 1924 license as amended herein, the Net Water Benefit would have been \$104,321 (Opinion No. 36, at 198). 25% of the Net Water Benefit, or \$26,080, would have been allocated to the beneficial owners of the lands utilized by the Escondido Canal. Of that amount, \$14,855, or 56.96%, would have been allocated to the United States for the use, occupancy and enjoyment of its non-tribal lands utilized by the Escondido Canal.⁴⁷ And \$7,381, or 28.30%, would have been allocated to the three Bands as the first part of the annual charge for the use, occupancy and enjoyment of their tribal lands by the Escondido Canal.

50% of the \$14,855 that would have been allocable to the United States for its non-tribal lands utilized by the Escondido Canal, or \$7,428, would have been allocated to the remaining beneficial owners of those lands. And of that amount, \$4,885, or 65.76%, would have been allocated to the three Bands as the second part of the annual charge for the use, occupancy and enjoyment of their tribal lands by the Escondido Canal. Accordingly, the total annual charge placed to the credit of the three Bands would have been \$12,266, or 11.76% of the Net Water Benefit of Project No. 176.

Annual charges of \$3,812, or 31.08%, would have been credited to the La Jolla Band; \$2,493, or 20.32%, to the

⁴⁷The allocation of a portion of the Net Water Benefit to the non-tribal lands of the United States is not an increased *payment* to the United States; it is a partial measure of the ultimate credit to the three Bands.

Rincon Band; and \$5,961, or 48.60%, to the San Pasqual Band. Under the Bands' approach based on the cost of rerouting the Escondido Canal around their respective reservations, annual charges of \$7,114, or 58%, would have been credited to the La Jolla Band; \$3,803, or 31%, to the Rincon Band; and \$1,349, or 11%, to the San Pasqual Band. Authority is being reserved in Article 19 to authorize changing the inter-Band allocation formula without obtaining the agreement of the Licensee.

In Opinion No. 36, interest on annual charges for past periods was fixed at 7% per annum prior to October 10, 1974, and 9% per annum on and after that date, in accordance with the prevailing commercial rate of return utilized for refunds of excessive rates and charges as currently fixed by 18 CFR § 35.19a. The Licensees contend that Opinion No. 36 should have utilized the rates specified in 18 CFR § 11.21(b)(2) for determining annual charges for non-tribal lands of the United States, which were 6-3/8% for 1977, and 6-5/8% for 1978, and is 6-7/8% for 1979. That rate was described by the Commission in Order No. 560 issued December 29, 1976, as reflecting Federal long term borrowing costs, and as being more than nominal and less than a commercial rate.⁴⁸ While it is one thing to base rentals to the United States for its non-tribal lands on its long term borrowing costs, we think that interests on rentals for past periods to other beneficial owners of lands is more suitably based on prevailing commercial rates.⁴⁹

⁴⁸The rate specified in 18 CFR § 11.21(b)(2) is adapted from the U.S. Water Resources Council and has a statutory base in Pub. L. No. 93-251, § 80 (March 7, 1974). Accordingly, there would be no rate to apply back to 1969.

⁴⁹The date of this Opinion No. 36-A and order on rehearing will be treated as the "date of this amendment" for the purpose of paragraph (g) of Article 19, as amended herein. Accordingly, the initial filings should be made within 90 and 120 days, respectively, after the date hereof.

Indian Service Area (Article 29)

Reimbursement of the Cost of Canal Water (Article 31)

The Licensees contend that there is no statutory authority for Article 29, requiring them to permit diversions of water from the Escondido Canal to the Indian Service Area, and Article 31, requiring the La Jolla, Rincon and San Pasqual Bands to reimburse them for the "Cost of Canal Water". They say that California law governs matters pertaining to the consumptive use of water, and the geographic service areas in which municipalities distribute water. And they call attention to the fact that Section 27 of the Federal Power Act leaves intact California law relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or vested rights therein. The Licensees characterize Articles 29 and 31 as transferring "the benefits of the cheaper local water . . . at cost, to the new public beneficiaries living on lands within the Indian reservations," and contend that the Commission cannot "undertake the vast transfer of consumptive water rights as postulated by Articles 29 and 31."

Article 29 transfers no water rights owned by the Licensees. It merely requires them to permit diversions of water to the La Jolla, Rincon and San Pasqual Indian Reservations to the extent that those reservations are entitled to that water under applicable law. Litigation involving the water and related contractual rights which are incident to Project No. 176 has been pending for ten years. And our commitment under Article 28 of the 1979 license for Project No. 176 is to amend that license in any appropriate manner in conjunction with or following the final disposition of that litigation, so that the diversions of water ultimately authorized by the license will be consistent with the water and related contractual rights as ultimately resolved by the litigation.

The first proviso of Section 4(e) of the Federal Power Act prohibits the Commission from issuing a license within a reservation, including Indian reservations, if it is found that the license would interfere or be inconsistent with the purposes of the particular reservation. The Commission found, at 137-142, that a new license for Project No. 176 would interfere with the water supplies of the La Jolla and Rincon Indian Reservations and, consequently, with the purposes of those reservations, unless a new license would be conditioned to preclude such results. The Commission said, at 137, that Article 29 is the vehicle through which it was able to make an appropriate finding under Section 4(e) and, "consequently, it is the price in water of the power license issued herein."

The statements of the Commission's authority to permit diversions of water for consumptive use should be read in the foregoing light. Contrary to the Licensees' suggestion, the statement on page 136 that "the Commission has authority under Section 10(a) to require the modification of water rights incident to a project if such modification is necessary to enable the Commission to make a [non-interference] finding under Section 4(e)," is not a claim that the Commission has general authority to require licensees of water power projects to provide water to others for consumptive use other than as routinely provided in standard license forms. That question was not reached. The Commission's authority to provide water to the three Bands in this instance is bottomed, as indicated, on Section 10(a), but it is couched in terms of the ultimate judicial resolution of the dispute over the water and the related contracts, and is largely the product of the necessity of taking some action which would result in the allowance or disallowance of some water to the parties.

The Commission has long recognized that Section 27 of the Federal Power Act leaves State water law intact. Indeed, the Commission's lack of authority to adjudicate private rights to the use of water is the one aspect of this proceeding upon which all parties agree.

Although the water and related contractual rights have been in dispute, there are certain facets of those rights that are fairly clear. The Licensees do not contest the right of the La Jolla Band to an "ample supply and quantity of water" under the 1894 agreement. (Opinion No. 36, at 146.) The Rincon Band historically were farmers, diverting and appropriating water from the San Luis Rey River. (Opinion No. 36, at 8-9). And the San Pasqual Band has unquantified rights under Article 14 of the 1924 license to take water from the Escondido Canal for domestic purposes. (Opinion No. 36, at 144.) Considering that each of the three Bands was likely to have some water rights, it became obvious that "any resolution of the volumes and/or flows might be characterized as an adjudication of water rights, which the parties agree is not within the scope of this proceeding." (Opinion No. 36, at 143.)

In that light, Article 29 was fashioned upon the 1894 principle of providing an "ample supply and quantity of water", which is a contractual restatement of the Mission Indian Relief Act principle of supplying a "sufficient quantity of water for irrigating and domestic purposes". It was also fashioned upon Article 18 of the 1979 license for Project No. 176, which is the current version of Article 14 of the 1924 license and permits some consumptive use by others, and upon the Winters doctrine principle that permits holders of junior water rights to utilize water as long as the holders of the senior water rights have no *present* use for the water.

While our commitment is to cause Article 29 ultimately to conform to the judicial resolution of the water and related

contractual rights, it is obvious that displacements will occur until those rights are resolved. We could neither deny the three Bands all water pending a judicial decision, nor permit them to make unfettered use of the water pending such a decision. Nor could we refrain from acting in the proceeding because, in a sense, any such course arguably would have been an adjudication of private rights to water which is prohibited by Section 27.

On balance, we chose to permit the La Jolla, Rincon and San Pasqual Bands to go forward with their plans for irrigating their reservations. We chose not to impose any definite water limits in order to avoid any appearance of an adjudication of private rights to water. We anticipated that their plans would not proceed very far as long as the water rights litigation is pending, but we hoped that our action would help precipitate judicial action in that litigation.⁵⁰ Article 29 does not require the Licensees to provide any distribution services unless, of course, they choose to enter into private arrangements for such services. It requires them to permit diversions of water from the Escondido Canal to an area which probably should have been called the "Indian Diversion Area" rather than the "Indian Service Area", since it is not a true service area. Finally, it contemplates that the Bands will bear the costs of all facilities for diverting and utilizing the water, and that any Commission-authorized diversions in excess of the amounts ultimately adjudicated will be rolled back to conform to the ultimate judicial resolution of the water and related contractual rights.

⁵⁰In a filing made on October 11, 1979, the Licensees indicated that the United States District Court for the Southern District of California would decide at a hearing scheduled for November 5, 1979, among other matters, whether to proceed with the trial set for November 13, 1979.

In our opinion, such an approach under the circumstances of this proceeding, which are truly unique, is within our authority under the Federal Power Act and is not prohibited by Section 27.

License Amendment Filings (Article 27)

Article 27 of the 1979 license for Project No. 176 requires the Licensees to make certain filings within six months after its issuance. In view of the two year stay of the effective date of the license mandated by Section 14(b) of the Federal Power Act, we are modifying Article 27 to require the Licensees to make the filings within six months after the effective date of the license. The two year stay should obviate the time problems claimed by the Licensees.

Contractual Obligations (Article 34)

Article 34 of the 1979 license, requiring the Licensees to use their best efforts to fulfill their valid contractual obligations to supply electric power and water to the Bands, does not create any new contractual obligations, as suggested by the Licensees. In order to prevent any possible conflict between Article 34, requiring compliance with the 1914 agreement to provide water for the Rincon Indian Reservation⁵¹, and Article 29 (or Ordering Paragraph (F) of Opinion No. 36), requiring the Licensees to permit diversions of water to the Rincon Indian Reservation, the initial authorization of diversions should not be less than is required by Article 34 under the 1914 agreement. In other words, any contractual requirements which must be honored pur-

⁵¹On September 11, 1979, the United States District Court for the Southern District of California concluded that the 1914 agreement is void insofar as it purports to convey or limit the Rincon Band's water rights in the San Luis Rey River. Nonetheless, that agreement will continue to be "valid" for the purpose of Article 34 until the court ruling is final.

suant to Article 34 would be subsumed within the diversions that are authorized under Article 29 (or Ordering Paragraph (F) of Opinion No. 36). While we attempted to inject some meaning into the part of the 1922 agreement that pertains to the Pala Band, we are deleting the provision from Article 34 since the Licensees indicate that a well has been provided and others are planned under a stipulation filed with and approved by the United States District Court for the Southern District of California.

MISCELLANEOUS MATTER

The Cuca Road

On September 28, 1979, the Bands and Interior filed a motion for leave to file a Supplemental Petition for Rehearing to call attention to a recent development involving the Cuca Road, and on October 11, 1979, the Licensees filed an answer in opposition.

One of the interests in lands of Project No. 176 consists of a right-of-way from State Highway 76, through the privately owned Cuca Ranch and the La Jolla Indian Reservation, to the diversion dam. The right-of-way, or Cuca Road, incidentally provides the only access to portions of the La Jolla Indian Reservation. Although the easement owned by Mutual and Vista limits the use of the Cuca Road to their business purposes, the Joint Canal Superintendant in the past provided keys for the access gates to the members of the La Jolla Band who have had to use the road.

The Supplemental Petition for Rehearing states that since the issuance of Opinion No. 36 new owners of the Cuca Ranch have made matters more difficult for the affected members of the La Jolla Band. And, as a result, the Bands and Interior request the inclusion of a new condition in the 1979 license for Project No. 176 requiring the Licensees to permit the use of the Cuca Road by the appropriate members

of the La Jolla Band and their agents. Specifically, Interior states that it invokes Section 4(e) of the Federal Power Act to include the following condition:

The licensees shall make suitable arrangements for the use of the portion of the road from State Highway 76 to the diversion dam that traverses the Cuca Rancho by the La Jolla Band and its members and their agents, licensees or permittees who need the use of the road to obtain access to the lands of the La Jolla Indian Reservation south of the Cuca Rancho. In implementing this condition, the licensees are authorized to make full use of the power of eminent domain in conformity with Section 21 of the Federal Power Act, 16 U.S.C. § 814.

Insofar as the Supplemental Petition for Rehearing seeks to raise a problem with respect to the Cuca Road which has arisen since the issuance of Opinion No. 36, it is untimely under Section 313(a) of the Federal Power Act and inappropriate under § 1.34(b) of the Commission's Rules of Practice and Procedure as not specifying an alleged error in Opinion No. 36.

On the merits, Section 4(e) provides that a license shall be subject to and contain such conditions as Interior "shall deem necessary for the adequate *protection and utilization* of such reservation." (Emphasis added.) In context, a license shall be subject to and contain such conditions so that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired". The Bands and Interior have not alleged any conduct on the part of the Licensees to prompt us to impose the requested condition for that purpose. Indeed, they admit that the Joint Canal Superintendent has always provided the necessary keys in the past and that the present difficulties are being caused by the new owners of the Cuca Ranch who

are insisting upon strict compliance with the terms of the easement. The obvious purpose of the requested condition is to require the Licensees, rather than the La Jolla Band, to bear the cost of permitting the members of the La Jolla Band to gain access to part of their reservation by way of the Cuca Road. We find that any interference or inconsistency with the La Jolla Indian Reservation is not caused by Project No. 176, but is attributable entirely to the new owners of the Cuca Ranch. Under these circumstances, the request is not a proper one under Section 4(e) and is denied.

The Commission further finds:

The assignments of error and grounds for rehearing set forth in the applications for rehearing filed March 28, 1979, by Escondido, Mutual and Vista; Interior; and the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands, present no facts or legal principles which would warrant any change in or modification of Opinion No. 36 and order issued February 26, 1979, except as that Opinion and order is modified and clarified herein.

The Commission orders:

(A-1) Ordering Paragraph (A) of the Commission's order issued April 27, 1979, staying Ordering Paragraphs (B), (C), (D) and (F) of the Commission's Opinion No. 36 and order issued February 26, 1979, is hereby vacated.

(A-2) The effective date of Ordering Paragraph (B) of the Commission's Opinion No. 36 and order issued February 26, 1979, issuing a new license for Project No. 176, is hereby stayed pursuant to Section 14(b) of the Federal Power Act and § 16.10 of the Commission's Regulations Under the Federal Power Act, for a period of two years after the date of issuance of this Opinion No. 36-A and order on rehearing, after which period the stay shall terminate, unless

terminated earlier upon motion of the Secretary of the Interior or by action of Congress, or unless extended by action of Congress.

(A-3) The Secretary of the Commission shall notify the Congress of the stay granted by Ordering Paragraph (A-2).

(B) Ordering Paragraph (B) of the Commission's Opinion No. 36 and order issued February 26, 1979, issuing a new license for Project No. 176, is hereby modified as follows:

(B-1) Article 27 of Ordering Paragraph (B-3) of Opinion No. 36 is changed to begin as follows: "Within 6 months after the effective date of this license. . . ." And paragraph (2) of Article 27 is changed to begin as follows: "A permanent water operating plan for Project No. 176 which shall consider the needs of the Indian Service Area as defined in Article 29, as well as the service areas of the Licensees, including without limitation: . . ."

(B-2) Article 28 of Ordering Paragraph (B-3) of Opinion No. 36 is enlarged to add a second paragraph as follows:

Without changing the amount of annual charges in subparagraph (iii) of Article 30 for recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, other than as specified therein, the Commission may from time to time modify the provision in Article 30 for placing such annual charges in subparagraph (iii) to the credit of the La Jolla, Rincon and San Pasqual Bands of Mission Indians, respectively.

(B-3) Subparagraphs (ii) and (iii) of the first paragraph of Article 30 of Ordering Paragraph (B-3) of Opinion No. 36 are changed to read as follows:

(ii) For the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations, comprising

355.76 acres utilized by the Escondido Canal and the Lake Wohlford development and acreage to be determined utilized by the Lake Henshaw development, a reasonable annual charge as determined by the Commission in accordance with its regulations in effect from time to time.

(iii) For the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, other than the tribal lands within the Rincon Indian Reservation which are used and occupied for the generation of electric power, and other than certain tribal lands within the La Jolla, Rincon and San Pasqual Indian Reservations which are used and occupied for communication and other services by wire, a reasonable annual charge determined in the following manner and consisting of the sum of (A) and (B):

(A): Multiply twenty-five percent of the Net Water Benefit of Project No. 176 by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, by the total distance in feet traversed by the Escondido Canal from Station 1 through Station 302A, inclusive, which distances are to be determined as of the beginning of the calendar year.

(B): (1) Multiply twenty-five percent of the Net Water Benefit of Project No. 176 by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the lands of the United States other than tribal lands embraced within Indian reservations, by the total distance in feet traversed by the Escondido Canal from Station 1 through Station 302A, inclusive; (2) subtract from the foregoing computation, the part of the annual charges in subparagraph (ii) above for recom-

pensing the United States for the use, occupancy and enjoyment by the Escondido Canal of it lands other than tribal lands embraced within Indian reservations; (3) divide the foregoing difference by two; and (4) multiply the foregoing quotient by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, by the difference between the total distance in feet traversed by the Escondido Canal from Station 1 through Station 302A, inclusive, and the aggregate distance in feet traversed by the Escondido Canal through the lands of the United States other than tribal lands embraced within Indian reservations.

(B-4) The third sentence of the fourth paragraph of Article 30 of Ordering Paragraph (B-3) of Opinion No. 36 is changed to begin as follows: "Second, the sum of (A) and (B) in the computation of the Gross Water Benefit of Project No. 176 shall be placed tentatively to the credit of the respective Bands. . . ."

(B-5) The second sentence of the second paragraph of Article 34 of Ordering Paragraph (B-3) of Opinion No. 36, pertaining to the agreement of June 28, 1922, is deleted.

(B-6) Ordering Paragraph (B-6) of Opinion No. 36 is vacated.

(B-7) Ordering Paragraph (B) of Opinion No. 36, as modified by this Ordering Paragraph (B), is final. The failure of the Licensees to seek judicial review of Opinion No. 36, as modified by this Opinion No. 36-A and order on rehearing, pursuant to Section 313(b) of the Federal Power Act, shall (notwithstanding the stay of the effective date as provided in Ordering Paragraph (A-2)) constitutes acceptance of the license for Project No. 176. In acknowledgment

of this acceptance of the license and its terms and conditions as modified, and notwithstanding the stay of the effective date as provided in Ordering Paragraph (A-2), the license shall be signed for the Licensees and returned to the Commission within 60 days from the date of issuance of this Opinion and order on rehearing.

(C) Ordering Paragraph (C) of the Commission's Opinion No. 36 and order issued February 26, 1979, issuing a new license for Project No. 559, is hereby modified to correct subparagraph (i) of Ordering Paragraph (C-2) to read as follows:

(i) All lands, the use and occupancy of which are necessary or appropriate for the purposes of the project, constituting the project area and enclosed by the project boundary, which area consists of the 40-foot wide right-of-way beginning at the boundary of Project No. 176 enclosing the power house within the Rincon Indian Reservation, and extending approximately 0.6 miles in a northerly direction to Pole No. 12,111, which right-of-way is occupied by a 12 kV primary transmission line connecting the power house within the Rincon Indian Reservation and the Licensee's 12 kV Circuit No. 216 at Pole No. 12,111.

(D) Ordering Paragraph (D) of the Commission's Opinion No. 36 and order issued February 26, 1979, amending Article 19 of the 1924 license for Project No. 176, is hereby amended in its entirety to read as follows:

(D) Article 19 of the license for Project No. 176 issued to Escondido Mutual Water Company on June 25, 1924, as amended, is hereby amended as of September 23, 1969, with respect to the tribal lands of the La Jolla and Rincon Bands of Mission Indians, and as of May 26, 1970, with respect to the tribal lands of the San Pasqual Band of Mission Indians, as follows:

(D-1) Paragraph (d) of Article 19 is deleted, and a new paragraph (d) is added, as follows:

For the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the Rincon and San Pasqual Indian Reservations comprising the right-of-way for the former Rincon-Bear Valley transmission line, a reasonable annual charge of \$8.00 per mile until the date of restoration of the lands authorized by the license to be used for the line, which annual charge shall be placed to the credit of the Rincon and San Pasqual Bands of Mission Indians, respectively, in proportion to the acreage occupied within their respective reservations by the right-of-way for the line.

(D-2) A new paragraph (e) is added to Article 19, as follows:

For the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, other than the tribal lands within the Rincon Indian Reservation which are used and occupied for the generation of electric power, and other than the tribal lands within the Rincon and San Pasqual Indian Reservations comprising the right-of-way for the former Rincon-Bear Valley transmission line, a reasonable annual charge determined in the following manner and consisting of the sum of (A) and (B):

(A): Multiply twenty-five per cent of the Net Water Benefit of Project No. 176 by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, by the total distance in feet traversed by the Escondido Canal from Station 1 through Station

302A, inclusive, which distances are to be determined as of the beginning of the calendar year.

(B): (1) Multiply twenty-five per cent of the Net Water Benefit of Project No. 176 by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the lands of the United States other than tribal lands embraced within Indian reservations, by the total distance in feet traversed by the Escondido Canal from Station 1 through Station 302A, inclusive; (2) divide the foregoing computation by two; and (3) multiply the foregoing quotient by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, by the difference between the total distance in feet traversed by the Escondido Canal from Station 1 through Station 302A, inclusive, and the aggregate distance traversed by the Escondido Canal through the lands of the United States other than tribal lands embraced within Indian reservations.

For the purpose of this paragraph (c): The Term "Net Canal Water" is defined as the volume of water which leaves the Escondido Canal during a calendar year. The term "Cost of Canal Water" is defined as the cost to the Licensee and Vista Irrigation District of operating the water supply facilities of Project No. 176 and the Henshaw development during a calendar year, multiplied by 4,143 acre-feet, and divided by the number of acre-feet comprising the Net Canal Water during the same calendar year. The term "Cost of Alternative Water" is defined as the computed cost to the Licensee of obtaining 4,143 acre-feet of water for a calendar year from the least expensive source, as weighted for the Licensee's percentage domestic-agricultural distribution pattern for the same calendar year. And

the term "Net Water Benefit" is defined as the difference between the Cost of Alternative Water and the lower Cost of Canal Water for a calendar year.

The said annual charges in this paragraph (e) for the use, occupancy and enjoyment of the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, shall be placed to the credit of the La Jolla, Rincon and San Pasqual Bands of Mission Indians, respectively, in proportion to the respective distances traversed by the said conduit through their respective lands.

Without changing the amount of annual charges in this paragraph (e) for recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced with the La Jolla, Rincon and San Pasqual Indian Reservations, other than as specified herein, the Commission may from time to time change the provision for placing such annual charges in this paragraph (e) to the credit of the La Jolla, Rincon and San Pasqual Bands of Mission Indians, respectively.

(D-3) A new paragraph (f) is added to Article 19, as follows:

For the purpose of recompensing the United States for the use, occupancy, and enjoyment of the tribal lands embraced within the Rincon Indian Reservation which are used and occupied for the generation of electric power, a reasonable annual charge equal to fifty per cent of the Net Rincon Power Benefit of Project No. 176.

For the purpose of this paragraph (f): The term "Cost of Rincon Power" is defined as the cost to the Licensee of operating and maintaining the Rincon power facilities (including property taxes and amortization attributable thereto), and all demand, energy and other charges incurred for power purchased and resold to the Rincon Band of Mission Indians,

during a calendar year. The term "Rincon Power Revenues" is defined as the sum of all demand, energy and other charges invoiced for power purchased and resold to the Rincon Band of Mission Indians, during the same calendar year. And the term "Net Rincon Power Benefit" is defined as the difference between the Rincon Power Revenues and the lower Cost of Rincon Power for a calendar year.

The said annual charges in this paragraph (f) for the use, occupancy and enjoyment of tribal lands embraced within the Rincon Indian Reservation shall be placed to the credit of the Rincon Band of Mission Indians.

(D-4) A new paragraph (g) is added to Article 19, as follows:

The Licensee shall file with the Commission and serve upon designees of the La Jolla, Rincon and San Pasqual Bands of Mission Indians and the Department of the Interior, on or before February 1 of each year, a statement under oath showing all of the information which is necessary or useful for the computation and crediting of annual charges as provided in this Article 19, together with its computations. The La Jolla, Rincon and San Pasqual Bands of Mission Indians and the Department of the Interior may file with the Commission and transmit to the Licensee and the others mentioned in this paragraph, on or before March 1 of each year, a statement under oath in opposition to the said information and computations. Such statements shall be considered and acted upon by the Commission officer who is then performing the functions which are performed at the time of this amendment by the Director of the Division of Licensed Projects, Office of Electric Power Regulation, or that officer's Deputy, to whom authority to act is hereby delegated.

The initial filing under this paragraph (g) covering all past periods shall be made within 90 days after the date of

this amendment, and the initial filing in opposition, if any, shall be made within 120 days after the date of this amendment.

(D-5) A new paragraph (h) is added to Article 19, as follows:

The Licensee shall pay interest on the annual charges applicable to the tribal lands of the La Jolla, Rincon and San Pasqual Bands of Mission Indians (in excess of the amounts previously paid in the case of the San Pasqual Band) at the rate of 7% per annum on amounts payable prior to October 10, 1974; at the rate of 9% per annum on amounts accruing on and after October 10, 1974, on amounts payable prior to that date; and at the rate of 9% per annum on amounts payable on and after October 10, 1974, to the date(s) of payment.

(E) The motion filed by the Bands on May 21, 1979, to strike a portion of Mutual's, Escondido's and Vista's petition for rehearing, is denied.

(F) The Motion for Leave to File Supplemental Application for Rehearing and the Supplemental Petition for Rehearing, filed by the Bands and Interior on September 28, 1979, are denied insofar as they request the inclusion of another condition in Ordering Paragraph (B) of the Commission's Opinion No. 36 and order issued February 26, 1979, issuing a new license for Project No. 176.

By the Commission. Commissioner Holden voted present.

(SEAL)

Kenneth F. Plumb,
Secretary.

**Act of January 12, 1891, 26 Stat. 712
(Mission Indian Relief Act).**

The preamble to the Act provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
That immediately after the passage of this act the Secretary of the Interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided.

Section 2 provides, *inter alia*:

Sec. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior.

Section 8 provides:

Sec. 8. That previous to the issuance of a patent for any reservation as provided in section three of this act the Secretary of the Interior may authorize any citizen of the United States, firm, or corporation to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such reservation for agricultural, manufacturing, or other purposes, upon condition that the Indians owning or occupying such reservation or reservations shall, at all times during such ownership or occupation, be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior,

and upon such other terms as he may prescribe, and may grant a right of way for rail or other roads through such reservation: *Provided*, That any individual, firm, or corporation desiring such privilege shall first give bond to the United States, in such sum as may be required by the Secretary of the Interior, with good and sufficient sureties, for the performance of such conditions and stipulations as said Secretary may require as a condition precedent to the granting of such authority: *And provided further*, That this act shall not authorize the Secretary of the Interior to grant a right of way to any railroad company through any reservation for a longer distance than ten miles. And any patent issued for any reservation upon which such privilege has been granted, or for any allotment therein, shall be subject to such privilege, right of way, or easement. Subsequent to the issuance of any tribal patent, or of any individual trust patent as provided in section five of this act, any citizen of the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

Federal Power Act § 3(2), 16 U.S.C. § 796(2).

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

Federal Power Act § 4(e), 16 U.S.C. § 797(e).

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by

the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

Federal Power Act § 10(a), 16 U.S.C. § 803(a).

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

Federal Power Act § 10(e), 16 U.S.C § 803(e).

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States

shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power

created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

Federal Power Act § 10(i), 16 U.S.C. § 803(i).

In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this Part, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: Provided, That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations. [Sec. 10(i) as amended by the Act of August 26, 1935 and Sept. 7, 1962.]

Federal Power Act § 14, 16 U.S.C. § 807.

(a) Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof [16 USCS § 796], and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects

taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act [16 USCS §§ 791a et seq.], by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: Provided, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act [16 USCS §§ 791a et seq.] at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

(b) No earlier than five years before the expiration of any license, the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 15 [16 USCS § 808]. In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects. Thereafter, the Commission,

if its [it] does not itself recommend such action pursuant to the provisions of section 7(c) of this part [16 USCS § 800(c)], shall upon motion of such department or agency stay the effective date of any order issuing a license, except an order issuing an annual license in accordance with the proviso of section 15(a) [16 USCS § 808(a)], for two years after the date of issuance of such order, after which period the stay shall terminate, unless terminated earlier upon motion of the department or agency requesting the stay or by action of Congress. The Commission shall notify the Congress of any stay granted pursuant to this subsection."

Federal Power Act § 15(a), 16 U.S.C. § 808(a).

(a) If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

Federal Power Act § 15(b), 16 U.S.C. § 808(b).

(b) In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a new licensee only on the condition that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 14 [16 USCS § 807] hereof. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of the Act of August 15, 1953 (67 Stat. 587) [16 USCS §§ 828 et seq.], every licensee for nonpower use shall keep such accounts and file such annual and other periodic or special reports concerning the removal, alteration, nonpower use, or other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.

Federal Power Act § 27, 16 U.S.C. § 821.

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control,

appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Federal Power Act § 29, 16 U.S.C. § 823.

All Acts or parts of Acts inconsistent with this chapter are repealed: *Provided*, That nothing contained in this chapter shall be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, granting certain rights-of-way to the city and county of San Francisco, in the State of California.

DEC 15 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-2056
IN THE
Supreme Court of the United States

October Term, 1983

ESCONDIDO MUTUAL WATER COMPANY, *et al.*,
Petitioners,

vs.

LA JOLLA BAND OF MISSION INDIANS, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit.

JOINT APPENDIX.

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TABLE OF CONTENTS

	Page
Relevant Docket Entries from the Federal Energy Commission	1
Relevant Docket Entries from the United States Court of Appeals for the Ninth Circuit	7
Agreement dated June 4, 1894, between the Escondido Irrigation District and the Potrero Band or Village of Mission Indians filed February 14, 1972, as Exhibit (Attachment) 3-01 to the Stipulation of Facts (Exhibit A-1)	9
Resolution dated September 3, 1894, of the Escondido Irrigation District filed February 14, 1972 (Exhibit A-1, Attachment 3-02)	14
Letter dated August 27, 1913, from C. R. Olberg, Superintendent of Irrigation to W. M. Reed, Chief Engineer, U. S. Indian Service, filed February 14, 1972 (Exhibit A-1, Attachment 7-09)	18
Agreement dated February 2, 1914, between the United States, for and on behalf of the Rincon Indians, and the Escondido Mutual Water Company filed February 14, 1972 (Exhibit A-1, Attachment 3-06)	22
Agreement dated June 28, 1922, between William G. Henshaw and the United States of America by the Secretary of Interior for the Indians of the Rincon and Pala Reservations filed February 14, 1972 (Exhibit A-1, Attachment 3-08)	28
Excerpt from Reporter's Transcript of June 28, 1973 (colloquy of counsel and ALJ re Interior's § 4(e) conditions) [9 TR 1816 (line 1) - 1824 (line 21)]	39
Excerpt from Reporter's Transcript of November 13, 1973 (cross-examination of Bands' witness Stetson) [16 TR 3327 (line 13) - 3329 (line 21)]	47

	Page
Letter dated November 14, 1973, from W. W. Lyons, Deputy Under Secretary of the Interior, to Kenneth F. Plumb, Secretary of the Federal Power Commis- sion (Exhibit I-78)	49
Excerpts from Reporter's Transcript of November 15, 1973 (colloquy of counsel and ALJ re Exhibit I-78) [18 TR 3839 (lines 20-25); 18 TR 3840 (lines 11- 15); 18 TR 3841 (line 9) - 3843 (line 12)]	62
Excerpts from Reporter's Transcript of November 15, 1973 (direct and cross-examination of Interior's wit- ness Kunkle) [18 TR 3857 (line 25) - 3861 (line 25); 18 TR 3878 (lines 8-14)]	65
Excerpt from Reporter's Transcript of November 16, 1973 (recross-examination of Interior's witness Kun- kle [19 TR 4000 (line 23) - 4001 (line 15)]	69
Excerpt from Additional Prepared Testimony of Inter- ior's witness Finale filed November 16, 1973 [Ex- hibit I-77, pp. 2 (line 16) - 5 (line 5)]	70
Excerpts from Reporter's Transcript of November 26, 1973 (colloquy of counsel and ALJ re Exhibit I-78) [24 TR 5022-C (line 23) - 5064 (line 24)]	72
Excerpts from Reporter's Transcript of December 4, 1973 (colloquy of counsel and ALJ with Interior officials re Exhibit I-78) [29 TR 6043 (line 16) - 6045 (line 9); 6046 (line 14) - 6047 (line 17); 6055 (line 6) - 6056 (line 8); 6057 (line 12) — 6059 (line 19); 6062 (line 8) - 6128 (line 8); 6131 (line 4) - 6182 (line 3)]	105
Excerpts from Bands' and Interior's Report of Envi- ronmental Factors filed April 1, 1974 [Exhibit B- 110 pp. 128 (line 2) - 130 (line 11); 132 (line 4) - 134 (line 23); 139 (line 18) - 140 (line 23); 156 (lines 14-25); 175 (line 1) - 177 (line 14)]	202

	Page
Excerpts from Prepared Testimony of Bands' witness Stetson filed May 22, 1974 [Exhibit B-111, p. 8 (lines 9-21); pp. 36 (line 12) - 44 (line 24)]	210
Letter dated January 15, 1976, from W. W. Lyons, Deputy Under Secretary of the Interior, to Kenneth F. Plumb, Secretary of Federal Power Commission, filed July 15, 1976 (Exhibits I-78A, I-78B)	218
Initial Decision by ALJ issued June 1, 1977 (6 FERC ¶ 63,008)	243
Excerpt from Appendix D to Bands' Brief on Excep- tions to Initial Decision filed September, 1977 [Memorandum on Water Power Legislation from O.C. Merrill, Chief Engineer, Forest Service, dated October 31, 1917, pp. D-2 - 6 (line 24); D-16 (lines 22-24)]	369
Order allowing Certiorari filed October 17, 1983	375
(The following opinions have already been reprinted in the Petition Appendix (Pet.App.) at the pages indicated)	
Commission Opinion & Order No. 36 Issued February 26, 1979 (6 FERC ¶ 61,189)	Pet.App. 42
Commission Opinion & Order No. 36-A on the hearing Issued November 26, 1979 (9 FERC ¶ 61,241)	Pet.App. 310
Ninth Circuit Opinion Issued November 2, 1982 (694 F.2d 1223)	Pet.App. 1
Ninth Circuit Opinion On Rehearing Issued March 17, 1978 (701 F.2d 826)	Pet.App. 31

**Relevant Docket Entries from the Federal Energy
Commission.¹**

UNITED STATES OF AMERICA
Before The
FEDERAL ENERGY REGULATORY COMMISSION

Escondido Mutual Water Company; City of Escondido, California; and Vista Irrigation District	Project No. 176
Secretary of the Interior Acting in His Capacity as Trustee for the Rincon, La Jolla and San Pasqual Bands of Mission Indians v. Escondido Mutual Water Company and City of Escondido, California	Docket No. E-7562
Vista Irrigation District	Docket No. E-7655
San Diego Gas & Electric Company	Project No. 559

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>DESCRIPTION</u>
09/25/70	Complaint of Interior as Trustee for Rincon, La Jolla and San Pasqual Bands (Docket E- 7562)
01/31/71	Petition of San Pasqual, Rincon and La Jolla Bands (Bands) to Intervene in E-7562
04/01/71	Application of Mutual for New License for Project No. 176
04/14/71	Commission Order Permitting Interventions in E-7562 etc. (45 FPC 569)

¹Prior to October 1, 1977, all filings were with the Federal Power
Commission.

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>DESCRIPTION</u>
06/22/71	Petition of SDG&E to Intervene in New License Proceeding
06/25/71	Bands' Petition to Intervene in New License Proceeding and Consolidate with E-7562
06/28/71	Interior's Petition to Intervene in New License Proceeding and Consolidate with E-7562
05/11/71	Prehearing Conference in Washington before Administrative Law Judge (ALJ) (Reporter's Transcript Vol. I, pages 1-192, (1 TR 1-192)
07/12/71	Petition of SDG&E to Intervene in E-7562
07/30/71	Commission Order Permitting Interventions, Instituting Investigation of Vista Irrigation District (VID) (Docket E-7655) and Consolidating New License Proceedings and Dockets E-7562 and E-7655 (46 FPC 253)
02/14/72	Joint Stipulation of Facts filed (65 pages of text plus approximately 950 pages of attached exhibits)
03/23/72	Petition of VID for Declaratory Order to Clarify Investigation
03/30/72	Petition of Bands to file late Application for Non-Power License
05/18/72	Commission Order Clarifying Order Instituting Investigation of VID (47 FPC 1321)
05/22/72	Interior Recommends Conditions and Proposes Federal Takeover of Project No. 176
06/05/72	Motion of Bands to File Application for Non-Power License and Proposed Application
07/06/72	Bands Supplement Non-Power License Application
08/08/72	Bands Supplement Non-Power Application

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>DESCRIPTION</u>
08/29/72	Bands Supplement Non-Power Application
10/18/72	Interior Supplements its takeover recommendation
12/05/72	Commission Orders Takeover Recommendation as a Part of Project 176 New License Proceedings (48 FPC 1192)
01/29/73	State of California Department of Fish and Game Petitions to Intervene
02/20/73	Commission Order Granting Intervention to State of California
07/09/73	Pala Band Files Application to Join in Non-Power License Application
09/10/73	Interior Files Letter re Bands' Non-Power Application
09/17/73	Commission Order Permits Late Filing of Bands Non-Power Application, Permits Intervention and Designates Proceeding Part of Project 176 New License Proceeding (50 FPC 785)
09/19/73	Formal Hearings before ALJ commence in Escondido, California, continue through September 26, 1973 (2 TR 199 - 7 TR 1516)
09/27/73	Hearings reconvene on Pala Indian Reservation and continue through October 4, 1973 (8 TR 1517 - 13 TR 2919)
10/05/73	Hearings reconvene for one day in Escondido, California (14 TR 292-03124)
11/12/73	Hearings reconvene in Washington, D.C., and continue through December 12, 1973 (15 TR 3125 - 35 TR 7683)

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>DESCRIPTION</u>
03/01/74	SDG&E files Application for new License for Project No. 559
04/01/74	Mutual and Bands file Draft Environmental Impact Report for Project 176
05/23/74	Commission Notice of Issuance of Annual License for Project 176 to Mutual (51 FPC 1610)
07/09/74	Commission Order Granting Rehearing and Amending prior Notice of Issuance of Annual License to Mutual
07/22/74	Hearings reconvene in Washington, D.C. and continue through July 24, 1974 (36 TR 7684 - 38 TR 8238)
09/03/74	Commission Order Consolidating Application for New License for Project No. 559 with Proceedings in Project No. 176 and Granting Intervention
09/13/74	Commission Staff Files Draft Environmental Impact Statement
09/23/74	Bands File Brief in Support of Petition to Declare Certain Uses of Project in Violation of License
11/25/74	Brief of Mutual, VID and Commission Staff in Opposition to Bands' Petition to Declare Certain Uses of Project in Violation of License
06/11/75	Commission Notice of Issuance of Annual License for Project 176 to Mutual
08/19/75	Commission Staff Files Environmental Impact Statement for Project No. 176

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>DESCRIPTION</u>
11/25/75	Application by City to be Joint Licensee for Project No. 176
12/15/75	Hearings reconvene in Escondido, California continue through December 17, 1975 (39 TR 8239-41 TR 9075)
12/18/75	Hearings reconvene on Pala Indian Reservation and continue through December 19, 1975 (42 TR 9076 - 43/44 TR 9535E)
01/06/76	Hearings reconvene in Washington, D.C. and finish on January 16, 1976 (45 TR 9536 - 53 TR 11,149)
01/12/76	P. Uihlein Hansen petitions to Intervene
01/12/76	Mutual and City File Application Seeking to Amend License re Undergrounding Portion of Canal
04/26/76	Commission Order Granting Late Intervention to P. Uihlein Hansen
06/03/76	Commission Notice of Issuance of Annual License for Project 176 to Mutual
07/19/76	Initial Briefs filed by Commission Staff; Bands and Interior; and VID, Mutual and City
10/12/76	Reply Briefs filed by Commission Staff; Mutual, City and VID; Bands and Interior
01/01/77	Initial Decision by ALJ on Contested Applications for Relicensing of a Canal Project (6 FERC ¶63,008)
06/03/77	Commission Notice of Issuance of Annual License(s) for Project No. 176 to Mutual

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>DESCRIPTION</u>
09/06/77	Briefs on Exceptions filed by Interior; VID, City, Mutual; Commission Staff and the Bands
12/15/77	Briefs Opposing Exceptions filed by City, Mutual and VID; Bands and Interior; and Commission Staff
02/26/79	Commission Issues Opinion and Order No. 36 (6 FERC ¶61,189)
03/28/79	Petitions for Rehearing and Requests for Stay filed by Interior and Bands; Escondido and VID
04/27/79	Commission Order Staying Opinion No. 36 in part and Granting Rehearing
05/12/79	Briefs responding to Petition for Rehearings Filed by Escondido and VID; Interior and the Bands
11/26/79	Commission Issues Opinion and Order 36A (6 FERC ¶61,141)
12/26/79	Petition for Rehearing filed by Escondido

**Relevant Docket Entries from the United States Court
of Appeals for the Ninth Circuit.**

United States Court of Appeals for the Ninth Circuit.

Escondido Mutual Water Company, City of Escondido,
and Vista Irrigation District, Petitioners, v. Federal Energy
Regulatory Commission, Respondent. No. 79-7625.

San Pasqual, La Jolla, Rincon, Pauma and Pala Bands
of Mission Indians, Petitioners, v. Federal Energy Regu-
latory Commission, Respondent, Escondido Mutual Water
Company, City of Escondido and Vista Irrigation District,
Intervenors. No. 80-7012.

The Secretary of the Interior, acting in his capacity as
Trustee for the Rincon, La Jolla and San Pasqual Bands of
Mission Indians, Petitioner, v. Federal Energy Regulatory
Commission, Respondent, Escondido Mutual Water Com-
pany, City of Escondido and Vista Irrigation District, In-
tervenors. No. 80-7110.

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>DESCRIPTION</u>
11/26/79	Petition for Review of Opinions 36 and 36A Filed by Mutual, City and VID (9th Cir. No. 79-7625)
11/27/79	Petition for Review of Opinions 36 and 36A Filed by the Bands (D.C. Cir. No. 79-2397)
01/02/80	Order by D.C. Circuit transferring No. 79- 2397 to Ninth Circuit (9th Cir. No. 80-7012)
01/24/80	Petition for Review of Opinions 36 and 36A Filed by Interior (D.C. Cir. No. 80-1111)
01/03/80	Amended Petition for Review Filed by Mu- tual, City and VID (9th Cir. No. 79-7625)
02/29/80	Order by D.C. Circuit transferring No. 80- 1111 to Ninth Circuit (9th Cir. No. 80-7110)

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>DESCRIPTION</u>
03/10/80	Certificate of Record In Lieu of Record filed (No. 79-7625)
05/14/80	Ninth Circuit Order Consolidating Nos. 79-7625, 80-7012 and 80-7110
08/15/80	Ninth Circuit Order permitting all Petitioners to Intervene as Respondents in related cases and setting briefing schedule
09/23/80	Opening Briefs filed by Interior; Bands; and Mutual, City and VID
04/29/81	Respondents' Briefs filed by Commission; Mutual, City and VID; Bands and Interior
11/23/81	Reply Briefs Filed by Interior; City, Mutual and VID; and the Bands
05/11/82	Ninth Circuit Order Permitting Filing of Deferred Joint Appendix
06/30/82	Supplemental Joint Appendix Filed
07/06/82	Oral Argument Before 9th Circuit Panel
11/02/82	Ninth Circuit Opinion (692 F.2d 1223)
12/16/82	Petitions for Rehearing Filed by Commission; Bands, Interior; Mutual, City and VID (also Suggestion for Rehearing en banc)
12/16/82	Motion and Amicus Curiae Brief filed by Joint Board of Control of Flathead, Mission and Jocko Valley Irrigation Districts
02/22/83	Ninth Circuit Order Denying Motion of Joint Board of Control to File Amicus Curiae Brief (Judge Anderson Dissenting)
03/17/83	Ninth Circuit Order on Petition for Rehearing (Judge Anderson, Concurring and Dissenting) (701 F.2d 826)
03/31/83	Ninth Circuit Order Granting Motion for Stay of Mandate pending filing of Petition for Certiorari

Agreement dated June 4, 1894, between the Escondido Irrigation District and the Potrero Band or Village of Mission Indians filed February 14, 1972, as Exhibit (Attachment) 3-01 to the Stipulation of Facts (Exhibit A-1).

United States of America, Federal Power Commission.
Escondido Mutual Water Company. Project No. 176.

Secretary of the Interior Acting in His Capacity as Trustee for the Rincon, La Jolla and San Pasqual Bands of Mission Indians v. Escondido Mutual Water Company and City of Escondido, California. Docket No. E-7562.

Vista Irrigation District. Docket No. E-7655.

(EXHIBIT A-1)

STIPULATION OF FACTS

* * *

Attachment 3-01

THIS AGREEMENT made and entered into this 4th day of June, 1894, by and between the Escondido Irrigation District of California, a public corporation organized under the laws of the State of California, of the first part, and the Potrero band or village of Mission Indians by its chiefs and headmen, of the second part, witnesseth:

(1) That in consideration of the grant of a right of way not exceeding fifty (50) feet in width to said District, its successors or assigns, with all the usual rights of land and water and of ingress, egress and regress, for the purpose of constructing, operating and maintaining an irrigating flume or canal with the necessary works appurtenant thereto through sections 31,32 and 33, township 10 south, range 1 east, S.B.M., in the Potrero reservation along the line as indicated on a map accompanying a letter from the United States Indian Agent, Mission Agency, California, dated September

18, 1893, the said company, its successors and assigns, shall furnish at its own expense and at such places or points along said flume or canal within said reservation and within the Rincon reservation and at and during such times and periods of time as the Indians on said reservations may desire or the United States Indian Agent in charge of said Indians may require, an ample supply and quantity of water for the use of said Indians for agricultural and for domestic purposes and for stock belonging to said Indians.

(2) That the said Potrero and Rincon Indians or the United States Indian Agent on their behalf shall have the right to tap the main flume or canal of said company within the said reservation at such points as may be desired by said Indians or their agent for the purpose of making such connections with the main flume or canal as may be necessary for the supply of water for said Indians as stipulated in paragraph one: *Provided*, That such connections shall be made under the supervision and to the satisfaction of the said District.

(3) That the right to the free use of a sufficient quantity of water from the flume or canal of said company as hereinbefore stipulated shall continue and be in force so long as the Indians shall reside upon the said reservations and as to any lands within said reservations that have heretofore or may hereafter be allotted to or held in trust for any Indian so long as said lands shall be so held in trust.

(4) That the said company apply such rules and regulations to said Indians to prevent the useless waste of water as it adopts for the same purpose outside of said reservations.

(5) That the said company may shut off the water in the fall or winter for the purpose of general or special repairs of its flumes, aqueducts or reservoirs and at such other times as urgent necessity may require but shall restore the water

in such flume or aqueduct as speedily as the nature of the case will permit.

(6) That if it shall be shown at any time to the satisfaction of the Interior Department that water is being taken by said company from the said San Luis Rey River in quantities sufficient to deprive the Indians below on the Potrero and Rincon reservations or either of them, of the supply necessary to their well being and comfort [sic] and to which they have hitherto been accustomed, the company will upon receipt of notice to that effect promptly shut off the supply of water to its flume, aqueduct, or canal for such time as may be necessary to give the said Indians the quantity of water required by them.

(7) That the company shall make no discrimination against the Indians on the said reservations in favor of persons outside thereof who have or may purchase the right to take water from said flume or canal and in case of a diminished supply of water from any cause beyond the control of the company the said Indians shall be entitled to and have their pro rata share of water distributed.

In witness whereof the parties hereto have set their hands and affixed their seals on the day and date first above written.

Escondido Irrigation District

By /s/ Emmett DeBell

(Seal of Company)

President.

Attest:

/s/ A.J. Werden

Secretary

Witnesses:

/s/ Flora Golsh

/s/ E.L. Abell

Indian signatures

/s/ LaJolla Juan Aguayo by FG

/s/ Potrero Frank Ward X

/s/ La Picha José M. Subish X

/s/ Pio B. Amago

(Certificate of Agent)
Office of U.S. Indian Agent
Mission Agency,
Colton, California.

I, Francisco Estudillo, U.S. Indian Agent of the Potrero band or village of Mission Indians in the State of California, do hereby certify that at a regular council legally assembled and organized, composed of the duly accredited representatives of the said Potrero band or village of Mission Indians, held at La Jolla School House on the Fourth day of June 1894, the foregoing agreement with the Escondido Irrigation District was, after full consideration and deliberation, formally accepted and signed by the Indians representing a majority of the chiefs and headmen of the band, in my presence.

Witness my hand this Fifteenth day of June 1894.

/s/ Francisco Estudillo
U.S. Indian Agent.

Certificate of Interpreter.

I, Andres Maxcy, interpreter for the Potrero band or village of Mission Indians aforesaid, do hereby certify that I was present at the council above mentioned, and that the agreement with the Escondido Irrigation District was by me fully interpreted and explained to the said Indians and that they understood and accepted the same.

Witness my hand this 4 day of June 1894.

/s/ Andres Maxcy
Interpreter.

(On reverse side of folded agreement)

Department of the Interior.
Office of Indian Affairs.
October 22, 1894.

The within agreement is hereby approved.

/s/ D.M. Browning
Commissioner

Department of the Interior.
November 14, 1894.

The within agreement is hereby approved.

/s/ Wm? (illegible)
Acting Secretary.

**Resolution dated September 3, 1894, of the Escondido
Irrigation District filed February 14, 1972 (Exhibit
A-1, Attachment 3-02).**

Attachment 3-02.

KNOW ALL MEN BY THESE PRESENTS: That we, the Escondido Irrigation District, a public corporation organized under the laws of the State of California for the purpose of furnishing water to irrigate the lands in said District situated in the County of San Diego, State of California, as principals and William Henry Baldrige, of Escondido, California, and Patrick Alexander Graham, of Escondido, California, as sureties are held and firmly bound unto the United States of America in the sum of five thousand dollars, lawful money of the United States to be paid to the Secretary of the Interior for the use and benefit of the Indians residing on the Potrero and Rincon reservations in the State of California; for which payment well and truly to be made we bind ourselves, our successors and assigns, our heirs, executors, administrators, jointly and severally, firmly forever by these presents; signed by our hands and sealed by our soals this eleventh day of June in the year of our Lord, eighteen hundred and ninety-four; WHEREAS, The eighth section of the Act of Congress approved January 12, 1891, provides that subsequent to the issuance of any tribal patent or of any individual trust patent as provided in section five of said act, any citizen of the United States, form or corporation may contract with the tribe, band or individual for whose use and benefit any lands are held in trust by the United States for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across or through said lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose: And,

WHEREAS, A contract has been made by and between the said Escondido Irrigation District and the said Potrero band or village of Mission Indians, and approved by the Secretary of the Interior on the ____ day of _____, eighteen hundred and ninety-four;

Now the condition of the above written bond or obligation is such that if the above bounden Escondido Irrigation District, its successors or assigns shall keep and perform all the terms, conditions and stipulations provided in said contract approved by the Secretary of the Interior as aforesaid, then the above written bond or obligation shall be void and of no effect; otherwise it shall be in full force and virtue.

Attest: Emmett H. De Bell
President Escondido Irrigation District.

(Seal of Company).

William Henry Baldridge Seal
Patrick Alexander Graham Seal

Attest:

A. J. Werden,
Secretary.

Signed, sealed and delivered by the above bounden William Henry Baldridge and Patrick Alexander Graham and the Escondido Irrigation District as Principal.

In the presence of E. L. Dorn
E. F. Tabor

Post Office address Escondido, San Diego County, Calif.

State of California, County of San Diego ss.

Personally appeared before me, A. H. Sweet, U. S. Commissioner of the United States Circuit Court, Ninth Judicial Circuit, Southern District of California, this 3rd day of September, 1894, P. A. Graham and W. H. Baldrige, who, being duly sworn, each for himself and not for the other, swears that he is worth more than the sum of five thousand dollars in real property not exempt from execution, over and above his just debts and liabilities; that he is a resident house and free holder in the County of San Diego, State of California, and that he is one of the sureties upon the bond given by the Escondido Irrigation District to carry out its agreement in relation to the waters of the San Luis Rey River and the Indians on the Rincon and Potrero Reservations.

P. A. Graham
W. H. Baldrige

(SEAL)

Subscribed and sworn to before me
this 3rd day of September, 1894.

A. H. Sweet,
Commissioner of the U. S. Circuit Court, Ninth Circuit,
Southern District of California.

I, A. H. Sweet, Commissioner of the U. S. Circuit Court, Ninth Judicial District, Southern District of California, hereby certify that I am acquainted with the above named P. A. Graham and W. H. Baldrige, and to the best of my information and belief they are worth the sum mentioned in

the foregoing justification, and that they are sufficient upon the bond mentioned therein.

A. H. Sweet,

Commissioner of the U. S. Circuit Court, Ninth Judicial District, Southern District of California.

(SEAL)

Letter dated August 27, 1913, from C. R. Olberg, Superintendent of Irrigation to W. M. Reed, Chief Engineer, U. S. Indian Service, filed February 14, 1972 (Exhibit A-1, Attachment 7-09).

Attachment 7-09.

[Letterhead]

Department of the Interior
United States Indian Service

Proposed Agreement for Power Rights between Escondido Mutual Water Co. and Rincon Reservation.

August 27, 1913.

Mr. W. M. Reed, Chief Engineer,
U. S. Indian Service,
Washington, D.C.

Sir:

I enclose herewith two copies of Memorandum of Agreement submitted by the Escondido Mutual Water Company for consideration.

This agreement is the matter that was under discussion among the officers of the above Company, yourself, Mr. Runke, Superintendent of Rincon Reservation, Mr. Schanck and myself at the time of your visit to the Rincon Reservation last spring.

You will observe that the terms of the agreement are a great deal more liberal to the Indians than those proposed by the officers of the Escondido Mutual Water Company at that time, and these terms have only been secured by numerous letters and conferences on the part of Mr. Schanck and myself.

The agreement in effect abrogates and is in lieu of the agreement or contract dated June 4, 1894, entered into by the predecessors of the Escondido Mutual Water Company

and the United States on behalf of the Rincon Indians. A copy of the original agreement, together with a description of the property and rights of the Escondido Mutual Water Company in the waters of the San Luis Rey River, is given in a report by the writer dated January 17, 1912, entitled "Report on Water Rights, Escondido Mutual Water Company".

The abrogation of the old contract and the approval of the new is desirable by reason of the changed irrigation conditions on the Rincon Reservation, caused by the inauguration of our present irrigation system and the necessity of the Escondido Mutual Water Co. for an auxiliary source of power, to supplement that which they proposed to generate by means of water impounded in their reservoir near Escondido. The water from the reservoir is also used for irrigation and it is only possible to develop power during the irrigation season. During the balance of the year they propose to obtain power from their plant installed on the Rincon Reservation. For this reason, the installation of the proposed plant at Rincon is necessary to make their power project practicable.

The description of the irrigation work now in progress on the Rincon Reservation is given in report of the writer dated October 16, 1911, entitled "Report on Proposed Pumping Plant, Rincon Indian Reservation". At the time this report was prepared the minimum low water flow of the San Luis Rey River at the intake to the Escondido Canal appeared to be in excess of 100 California miner's inches. Since that date, however, several exceptionally dry years have occurred and, during the past summer, the river has been dry, during short periods, at the above point. The original plan contemplated the installation of a penstock leading from the Escondido Mutual Water Co's canal to a water wheel located at the proposed well near the mouth of

the San Luis Rey Canyon.

The low water flow of the river, as recently observed, is not sufficient, however, to operate the plant during the dry periods and it will be necessary for us either to install a distillate engine for auxiliary power or purchase power from outside sources for the operation of the plant during such periods. On this account the plan proposed by the Escondido Mutual Water Company to supply power at a nominal rate will be of great benefit to the Indians. Further, by this arrangement it will not be necessary for this Service to install the penstock leading from the canal into the well, thereby saving to this Service a sum approximating \$6,000.00.

The agreement has received the careful consideration of Mr. F. R. Schanck, Superintendent of Irrigation in charge of electrical matters, and his comments thereon accompany this letter. Mr. Schanck states that the rate of $\frac{1}{8}$ cent per kilowatt hour for power during ordinary periods is barely sufficient to cover the cost of their operation, while the rate of $1\frac{1}{3}$ cents per kilowatt hour for power during the dry period is less than it would cost this Service to develop power by means of a distillate engine.

For the above reasons and because the proposed agreement promises to be of great benefit to both the Indians and to the people residing in the vicinity of Escondido, I recommend that it receive your favorable consideration.

The agreement is forwarded as submitted by the Water Company, and will undoubtedly require a few changes in verbiage to make it conform to the usage of the Department. The agreement has the approval of Mr. Walter Runke, Superintendent of the Rincon Indians, but you will note that the agreement, as it stands, requires the participation of the Rincon Indians. I have no doubt but that the Indians will agree to the same when they understand its advantages, but

this participation will tend to delay the matter and, unless it be required by the Department, it would be simpler to have the agreement entered into by Mr. Runke on behalf of the Indians, and by the officers of the Escondido Mutual Water Company on the part of that Company.

It will be necessary for us to lay a pipe line extending from the tail race of the proposed power plant to our well in order to use the normal flow of the San Luis Rey River. We are now ready to install this line if the agreement is satisfactory to the Department and I would appreciate it if you would tell me at as early a date as possible whether the plan will receive the Department's approval so that we may proceed with our work.

Trusting that the same is satisfactory, I am,

Very respectfully yours,

/s/ C. R. Olberg

Superintendent of Irrigation.

CRO/LE

Enclosures (3)

[enclosures deleted]

Agreement dated February 2, 1914, between the United States, for and on behalf of the Rincon Indians, and the Escondido Mutual Water Company filed February 14, 1972 (Exhibit A-1, Attachment 3-06).

Attachment 3-06.

THIS MEMORANDUM OF AGREEMENT, made and entered into this second day of February, 1914, by the United States, for and on behalf of the Rincon Indians, party of the first part, and the Escondido Mutual Water Company, a corporation organized and existing under and by virtue of the laws of the State of California, party of the second part, WITNESSETH,

WHEREAS, a certain contract was made and entered into on the 4th day of June, 1894, by and between the Escondido Irrigation District of California, party of the first part, and the Potrero Band or Village of Mission Indians, party of the second part, wherein and whereby the rights of the Potrero and Rincon Indians, living on their respective reservations in the San Luis Rey Valley, and the Escondido Irrigation District were set forth and defined in relation to certain water privileges and water rights, and

WHEREAS, By reason of changed conditions, the assignment of all the right, title and interest in and to said contract by the Escondido Irrigation District, the Escondido Mutual Water Company has succeeded to all the obligations, rights, privileges and franchises of the Escondido Irrigation District, and

WHEREAS, Certain improvement are contemplated on the Rincon reservation by the United States Indian Service,

NOW, THEREFORE, Said contract of June 4th, 1894, is hereby modified and the rights of the parties hereto are defined as follows:

It is mutually understood and agreed that the Rincon Indians herein mentioned are entitled to the flow of the San Luis Rey river up to a maximum of six cubic feet per second.

It is further mutually understood and agreed that the United States, for and on behalf of said Rincon Indians, has reserved for their use and disposition, and shall reserve for their use and disposition, in any agreement relating to the water flowing or to flow in the San Luis Rey river, a minimum flow of six cubic feet of water per second of time, measured at or near the intake of the canal of the Escondido Mutual Water Company, and, in extremely dry years, a minimum flow of three cubic feet of water per second of time for the months of July, August, and September of each such extremely dry year. The flow of water so reserved shall be carried in the ditch of the Escondido Mutual Water Company and delivered by said Company to said Indians at the power plant to be constructed on the site hereinafter mentioned, and any water not needed or to be needed by said Indians shall be subject to the use and disposition of the Escondido Mutual Water Company for any purpose whatsoever: Provided, however, that no use or disposition of water by the company shall be made so as to work a disadvantage to said Indians, or any of them, or as infringing upon or otherwise limiting the rights reserved by them or the United States on their behalf.

That the United States, for and on behalf of the Rincon Indians, party of the first part, consents to and agrees with the Escondido Mutual Water Company, its successors or assigns, party of the second part, that the said second party, to-wit, the Escondido Mutual Water Company, may erect and maintain a power plant for the generation of electric current and the necessary buildings for said power plant and its attendants on the Rincon Indian reservation, at a point north of the the present ditch line of the Escondido Mutual

Water Company, and for the construction and operation of said power plant the Escondido Mutual Water Company is hereby granted the use of the following described real property:

Beginning at a point 1160.7 feet west and 333 feet south of the northeast corner of section 2, township 11 south, range 1 west, San Bernardino Base and Meridian; thence from said point of beginning 250 feet south, thence 300 feet west, thence 250 feet north, thence 300 feet east to the point of beginning, embracing 1.72 acres.

It is hereby mutually agreed that the Escondido Mutual Water Company have sufficient water for domestic use and for irrigating trees, gardens and lawns on the land above described, provided such use shall not work any detriment or disadvantage to any of said Rincon Indians.

III

There is hereby granted by the party of the first part to the Escondido Mutual Water Company, the party of the second part, a right of way across the Rincon and San Pasqual Indian reservations for the construction of power transmission lines so that said party of the second part may have ingress, egress and regress for the purpose of constructing, operating, requiring and maintaining its power plant and transmission lines, and there is also granted to said party of the second part a right of way for a road across said Rincon Indian reservation, from a point on the county road crossing said reservation to the power plant site hereinbefore described, said right of way for road purposes not to exceed thirty feet in width; it being expressly understood that the Escondido Mutual Water Company, its successors or assigns, in the construction and maintenance of its power plant and in the enjoyment of its rights of way for ingress, egress and regress, shall so use its rights as to interfere with

the Indians as little as possible, and the party of the second part agrees to operate and maintain its pipe lines, power plants and transmission lines and accessories in such manner as not to damage the property or interests of said Rincon Indians or the party of the first part and to cause them no inconvenience other than such as may be necessarily incident to the construction and operation of said power plant and the maintenance of its pipe lines, transmission lines and accessories to said power plant.

IV

In consideration of the rights of way herein granted to the Escondido Mutual Water Company, its successors and assigns, the Escondido Mutual Water Company agrees to construct and put in operation the power plant herein referred to and to furnish to the Rincon Indians power for pumping purposes on the said Rincon reservation, according to the terms and conditions hereinafter set forth. In further consideration of said rights of way, privileges and benefits passing to the party of the second part, it agrees to deliver at its power plant, to be constructed on the site hereinbefore described, all the water used for generating electricity at said plant, to the Rincon Indians', to be subject to the use and disposition of the party of the first part for any purpose whatsoever.

The said party of the second part also agrees to furnish at said power plant to the Rincon Indians, from the power plant erected on the site hereinbefore described, electric current not to exceed the rate of seventy (70) kilowatts, said current to be constantly available whenever required for pumping water, so that when the pumped water is added to the water which passes through the power plant, said Indians will have all the water needed for their use, not to exceed six cubic feet per second; and the United States, for and on

behalf of the said Indians, shall pay to the party of the second part one-eighth of one cent per kilowatt-hour for all current furnished under this clause.

V

It is further mutually agreed by and between the parties that if the water flowing in the San Luis Rey river at the intake of the canal of the Escondido Mutual Water Company should be less than two cubic feet per second, the party of the second part may shut down its power plant and let the water run through the penstock for the use of the Indians, then and in that event the party of the second part will furnish electric current to said Indians from its power plant located below the reservoir, to the extent of the requirements of said Rincon Indians, not exceeding the rate of seventy kilowatts.

Said Company shall apply the same rules and regulations for the delivery of current under the clause next foregoing to said Indians as it applies to the stockholders of the Escondido Mutual Water Company using current for pumping purposes, and for such electrical current so delivered, the United States, for and on behalf of the Rincon Indians, agrees to pay to said party of the second part one and one-half cents per kilowatt hour. It is mutually understood and agreed that the measurement of electric power, for which payment is provided in this contract, shall be made at the power house of the party of the first part and at the same voltage as motors, provided said voltage be not less than two thousand two hundred. All expense of material and apparatus connecting up to and including meter shall be paid by the party of the second part. Payment for electric current shall be made by the United States for and on behalf of said Indians to the party of the second part for quarterly periods, and the party of the second part shall be responsible for the

accuracy of the motor and shall test the same at reasonable intervals, or upon reasonable evidence presented by the party of the first part that the motor is incorrect.

VI

It is further expressly understood that the delivery of the electric current hereinbefore provided for by the party of the second part to the party of the first part shall be subject to the reasonable rules and regulations of the Escondido Mutual Water Company and the laws of the State of California, provided the rules and regulations of the said Escondido Mutual Water Company shall at all times be reasonable and shall not in any manner abridge or modify the rights of said Indians as provided by the terms of this contract.

IN WITNESS WHEREOF, The parties hereunto have set their hands and affixed their seals.

Mar. 21, 1914

THE UNITED STATES OF AMERICA

By A.A. Jones

First Asst. Secretary of the Interior.

Witnesses:

/s/ A.W. Wohlford

/s/ E.E. Boudinot

ESCONDIDO MUTUAL WATER COMPANY.

By Albert Beven

President.

Attest:

/s/ Ned W. Phelps

Secretary.

[Jurat deleted]

Agreement dated June 28, 1922, between William G. Henshaw and the United States of America by the Secretary of Interior for the Indians of the Rincon and Pala Reservations filed February 14, 1972 (Exhibit A-1, Attachment 3-08).

Attachment 3-08.

AGREEMENT BETWEEN
WILLIAM G. HENSHAW
AND UNITED STATES OF AMERICA
BY THE SECRETARY OF INTERIOR FOR THE
INDIANS OF THE RINCON
AND PALA RESERVATIONS
JUNE 28, 1922

WHEREAS, William G. Henshaw of the city of San Francisco, State of California, contemplates the construction of a dam and reservoir for impounding storm and other waters for irrigation, domestic, municipal, power development and other purposes on the upper reaches of the San Luis Rey River in the state of California at a point commonly known as Warner's Ranch, in Sections 3 and 10, Township 11 South, Range 2 East, S. B. M.; and

WHEREAS, in order to accomplish the above mentioned purpose it is necessary for said William G. Henshaw to acquire or otherwise protect outstanding rights to waters in and along the said San Luis Rey River above and below said proposed dam and reservoir site; and

WHEREAS, the Indians of the Rincon Indian Reservation, located in Townships 10 and 11 S., Range 1 W., S. B. M., California, on the San Luis Rey River, below the proposed Warner's Dam, have a prior first right to the normal flow of the said San Luis Rey River to the extent of the first six second feet of water naturally flowing in said river at the intake of the Escondido Mutual Water Com-

pany's canal, and

WHEREAS, the Indians of the Pala Indian Reservation, located in Township 9 and 10, s., Range 2 W., S. B. M., California, on the San Luis Rey River below the proposed Warner's Dam, have a prior first right to the normal flow of the said San Luis Rey River to the extent of the first six second feet of water naturally flowing in said river, at the point where it crosses the eastern boundary line of said Pala Indian Reservation, and

WHEREAS, In a certain contract dated February 2, 1914, by and between the United States of America, acting for and on behalf of the Indians of the Rincon Reservation, California, as party of the first part, and the Escondido Mutual Water Company, successor in interest to the Escondido Irrigation District, a corporation duly organized under the laws of the State of California, as party of the second part, the prior rights of the Indians of the said Rincon Indian Reservation in and to the waters of the said San Luis Rey River have been recognized and defined; a copy of said contract being attached hereto, marked "Exhibit A," and hereby made a part hereof; and

WHEREAS, in a certain contract dated June 21, 1912, by and between the aforesaid Escondido Mutual Water Company, as party of the first part, and said William G. Henshaw, as party of the second part, the said Escondido Mutual Water Company did consent to the construction of said proposed dam and reservoir at "Warner's Ranch," subject to certain conditions, stipulations, covenants and agreements in said contract contained; a copy of said last mentioned contract being attached hereto, marked "Exhibit B," and hereby made a part hereof;

NOW, THEREFORE, this agreement made and entered into this 28 day of June, 1922, by and between the said

William G. Henshaw, first party, and the United States of America, acting in this behalf by its Secretary of the Interior, for and on account of the Indians of the said Rincon and Pala Reservations, California, second party;

WITNESSETH: That for and in consideration of the fact that impounding storm and flood waters in said reservoir at "Warner's Ranch" will tend to prevent loss of land by erosion along said river, and to prevent damage to the above mentioned Reservation and other property of the Indians living along said river, and in further consideration of the mutual covenants herein contained, it is agreed and understood by and between the parties hereto:

1. That, subject to the conditions and stipulations hereinafter contained, the Secretary of the Interior, in behalf of the Indians of the said Pala and Rincon Reservations, will interpose no objection to the construction, maintenance and use of the said proposed dam and reservoir at "Warner's Ranch" on the said San Luis Rey River, and diversion of the waters which shall be impounded therein.

2. That the prior rights of the Indians of Rincon Reservation in and to the waters of said San Luis Rey River, as set forth hereinbefore, are hereby expressly admitted, recognized and acknowledged by first party hereto; first party hereby reserves and excepts the right to claim and contend, as against said Escondido Mutual Water Company, that said company, by force of said contract of June 21, 1912, became and ever since has been and throughout the term of said contract will remain bound to furnish said Indians with their requirements of water for irrigation and domestic purposes, out of and from the supply of water allotted and guaranteed to said Company by said contract, also to claim and contend, as against said company, that first party, as to all water which he shall furnish or deliver to said Indians in pursuance of the terms hereof, shall be

entitled to credits in the amounts of water so furnished or delivered as against his obligations under said contract of June 21, 1912, to furnish water to said Escondido Mutual Water Company, but it is not intended that said Indians or any of them shall be compelled for any length of time or under any circumstances to look to or depend upon said Escondido Mutual Water Company for their supplies of water and the making of said reservation and exception shall not be construed to modify or limit the obligations of the party of the first part to the party of the second part or to the Indians mentioned herein, as hereinafter set forth, nor shall it be construed to qualify or limit the admission that said second party or said Indians have the first and prior right to the water of the San Luis Rey River to the extent hereinbefore expressed.

3. That if the watershed tributary to that part of the San Luis Rey River between the site of the proposed dam as hereinbefore described and the intake of the Escondido Mutual Water Company's canal located in Section 33, Township 10 South, Range 1 East, S. B. M., fails to produce in said river at the intake aforesaid during each and every calendar year water in the quantities to which the Indians are entitled as hereinbefore set forth, which said quantities of water shall be in addition to, over and above such amount of water as may be required to adequately protect all outstanding rights to water from said river and its tributaries of owners other than the Indians of the said Rincon Reservation, then and in that event, the first party hereby agrees that he will deliver or cause to be delivered, at his expense and without cost to said Indians, at the aforesaid intake of the Escondido Mutual Water Company's canal, water in such quantities and at such times as will, with the water, if any, then in said river at said intake, produce the natural flow up to 6 second feet; provided that the first party shall

not be obliged at any time to liberate from its reservoir any greater quantity of water than shall at the time be flowing into it.

It is mutually understood and agreed that the natural flow in the river shall be taken as the amount of water actually entering the Warner's reservoir added to the amount of water produced by the watershed between the Warner's dam and the intake of the Escondido Mutual Water Company's canal.

That to determine the natural flow of the river when it is six second feet, or less than six second feet, the party of the first part shall install and maintain measuring weirs or other suitable measuring devices in all tributaries of the San Luis Rey River immediately above the high water line of the Warner's Ranch reservoir and the canal therefrom and in the river bed immediately above the intake of the Escondido ditch, to be subject to the approval of the agents or representatives of the party of the second part; and that such measuring devices and their records shall at all times be accessible to the party of the second part or its representatives.

4. That should the distribution of waters hereinabove provided for fail in any year to bring, at any time between February 1st and May 1st of such year, the water plane underlying the surface of said Rincon Reservation up to the level of the bottom of the stream bed opposite pumping plant #1 established by the United States for use on the Rincon Reservation, said pumping plant being located in the Southeast corner of the Northeast quarter of the Southeast quarter of Section 35, Township 10 south, Range 1 West, S. B. B. & M., then and in every such contingency first party shall be found to perform one or another, as he may elect, of the following duties or obligations:

First: Immediately thereafter deliver at the intake point already mentioned such quantity of water in addition to any

which he may be at the same time bound to deliver by force of his agreement in the next preceding paragraph contained, as will within such month of May bring said underground water plane up to the level hereinbefore mentioned at a point opposite said pumping plant No. 1; or

Second: Deliver to said Indians at the tail race of the Rincon Power House of the Escondido Mutual Water Company quantities of water which will during each of the months of May to October, inclusive, when added to the quantity which the first party shall supply during the same month in fulfilling his obligations provided in the next preceding paragraph, satisfy their requirements of water for domestic and irrigation purposes during such months not to exceed 6 second feet, or

Third: Furnish without cost or charge to said Indians, at some suitable point to be selected by him within said Rincon Reservation, electric current sufficient to enable them to obtain, by pumping from wells now existing or hereafter sunk upon said lands and penetrating the water-bearing sands beneath, water sufficient, when added to the supplies to be furnished to them by first party in pursuance of his agreements in the paragraph next preceding to satisfy their requirements of water for domestic and irrigation purposes during the months of May to October, inclusive, of any such year.

Should it become necessary to discharge stored water into the San Luis Rey River from the said reservoir to be constructed at "Warner's Ranch," in order to replenish the underground supply at Rincon and bring such water plane to the elevation hereinabove designated, first party hereby covenants and agrees that he will not discharge or cause to be discharged water from such reservoir, in such manner or in such quantities as will result in damage or injury to the lands of the said Rincon Reservation, but that such water

will be discharged in such manner and at such times and as will best allow all the water so discharged to permeate the sand, gravel, and other sub-soils underlying said Reservation, for the purpose of replenishing the underground supply at Rincon and bring such water plane to the elevation hereinabove designated, as hereby required.

5. That, should there be valid outstanding rights other than those of the United States, the said Indians herein mentioned or other Indians, in and to the use of Water, riparian or otherwise, from the San Luis Rey River, which first party hereto has not acquired, then said first party hereby covenants and agrees to release from his reservoir at "Warner's Ranch," water in such quantities and at such times as will, when added to the waters then flowing in said river above the intake already mentioned, satisfy and fully protect such other outstanding rights and in all things necessary to adequately protect the United States and its Indian wards against any claim that the said dam and reservoir is storing or has stored water that should be allowed to flow down to satisfy said outstanding rights of others or that the United States or said Indians should, on account of said storage, share the waters of said river or its tributaries with others its being distinctly understood that the delivery of water hereinabove agreed to be made by first party at the aforesaid intake of the Escondido Mutual Water Company's canal is for the use, benefit and protection of the Indians of the reservations herein referred to, and for the purpose of enabling the Indians and the United States in their behalf to fulfill the obligation of that certain contract between the United States of America and the Escondido Mutual Water Company set forth in "Exhibit A" hereof.

6. It is further understood and agreed by and between the parties hereto that the Indians of the Pala Reservation, California, have a right prior to any which first party has

or may acquire in and to the entire flow of the San Luis Rey River whenever the quantity of water in said river, measured at the eastern boundary of said reservation, does not exceed six cubic feet of water per second and that the Indians of said reservation have such prior right in and to six cubic feet per second of the waters of said river at all times whenever the quantity flowing therein exceeds six cubic feet per second, measured at the point last herein above mentioned. Further, that owing to the extent of the watershed between the Pala Indian Reservation and Warner's Ranch, the site of said proposed dam and reservoir, the parties hereto believe that the flow of the San Luis Rey River at, in and through the said Pala Indian Reservation may not be injuriously affected by the construction of such proposed reservoir at Warner's Ranch; but, after construction of the said reservoir should the waters of the San Luis Rey River available for the use of the Indians of the Pala Reservation fall below the quantity required for the Indians of said reservation (not exceeding six cubic feet per second) then and in that event, the first party hereby agrees at his own expense and without cost to the Indians of said reservation to sink such wells, install such pumps, motors, pipes, pipelines, fittings, appliances, material and supplies (in addition to those now in said reservation), as may be necessary to furnish the Indians of the said Pala Reservation with the quantity of water for irrigation purposes to which they are entitled not exceeding a maximum of six cubic feet per second. The first party further agrees to furnish, at his own expense, such power, labor, material and supplies, as may be required for the proper operation, upkeep, maintenance and repair of such additional machinery, pumps, pipelines and other appliances, as may be installed hereunder; the location of such additional pumping plants, the size, kind and style of motors, pumps, machinery, fittings

and other appliances, and the installation of each and every part thereof to be subject to the approval of the second party, its agent or agents; all without cost to the Indians of said reservation.

7. That no member of or delegate to Congress, or Resident Commissioner, either after election or appointment, or either before or after he has qualified and during his continuance in office, and no officer, agent or employee of the Government shall be admitted to any share or part of this contract or agreement, and the provisions of Sections 3739-3740-3741 of the Revised Statutes of the United States relating to contracts enter into and form a part of this agreement so far as the same may be applicable. Nothing herein contained, however, shall be construed to extend to any incorporated company where such contract or agreement is made for the general benefit of such corporation or company, as provided in Section 116 of the Act of Congress approved March 4, 1909 (35 Stats. 1109).

8. First party shall have no right to set over, transfer and assign this contract and his rights hereunder without the consent and approval of second party excepting that first party shall have the right at any time to transfer, assign and set over this contract and all of his rights hereunder to any corporation incorporated or caused to be incorporated by him for the purpose of acquiring, holding, operating and utilizing all of his rights in or to the waters of said river; also acquiring or constructing, maintaining and operating said proposed dam and reservoir and their appurtenances and adjuncts, and which corporation shall have acquired and then own all title to or interest in said rights and properties which first party now owns or shall hereafter and up to the time of the making of such assignment acquire, provided that all rights and obligations of the first party herein shall inure to the benefit of and be binding upon said first party

and his heirs, executors, representatives, successors and transferees and assignees; also provided that such assignee shall in and by the instrument or assignment undertake to assume, perform and comply with all of the obligations, terms and conditions, to be performed or complied with by first party according to the provisions hereof.

If the said proposed dam and reservoir is not constructed and in operation prior to January 1, 1930, then and in that event the Secretary of the Interior may declare this contract forfeited, whereupon all rights of first party hereunder, his successors and assigns, shall thereupon cease.

9. That to assure faithful compliance with the provisions of this agreement, first party hereby agrees to furnish a good and sufficient bond satisfactory to the second party in an amount not exceeding twenty-five thousand dollars (\$25,000), and this contract, of which the said bond is to form a part, shall not be in full force or become effective until such bond has been furnished to the satisfaction of the second party. The furnishing of such bond, or the payment of any penalty or penalties thereunder by the first party shall not be considered as a waiver of any or all claims for damage which may arise to the Indians of the said Rincon and Pala Reservations, or to any of them, by reason of any breach of this contract, the intention being that any amount or amounts that may be paid by the first party pursuant to the provisions of such bond shall be regarded simply as part payment of the amount of actual damage that may result to the Indians of said reservations, or to any of them, by reason of any breach of this contract; saving to the party of the second part hereto and to the Indians of the said Pala and Rincon Reservation, or to any of them, such remedies or actions, at law or in equity, as fully and to the same extent as though such bond had not been furnished.

The party of the second part agrees to furnish such rights of way free of charge as it may deem necessary for the construction and operation or works required for the fulfillment of the terms of this contract providing the first party will settle in advance all just claims for damages caused to individual Indians; it being expressly understood that the party of the first part in the construction, operation and maintenance of all its works upon the reservations concerned and in the enjoyments of its rights of way for ingress and egress shall so use its rights as to interfere with the Indians as little as possible and not damage the property or interests of said Indians or the party of the second part further than such as may be necessarily incident to the carrying out of the provisions of this contract.

IN WITNESS WHEREOF, the parties hereto have subscribed their names the year and day first above written.

/s/ William G. Henshaw

By /s/ John Treanor

his Attorney-in-fact

Corporation Bldg 724 S Spring St. Los Angeles
Cal.

UNITED STATES OF AMERICA,

By /s/ E. B. Finney

First Assist. Secretary of the Interior

WITNESS:

E.E. Milliken

/s/ Title Insurance Bldg ... Spring St.

Los Angeles Cal.

/s/ Herbert V. Clotts

628 Federal Bldg Los Angeles Cal

[Jurat deleted]

**Excerpt From Reporter's Transcript of June 28, 1973
(Colloquy of Counsel and ALJ Re Interior's § 4(e)
Conditions) [9 TR 1816 (line 1) - 1824 (line 21)].**

PRESIDING JUDGE: Who is our next witness

Mr. Pelcyger, do you have a witness for us?

MR. PELCYGER: Yes, sir. Mr. Thomas M. Stetson.
Whereupon,

THOMAS M. STETSON assumed the witness stand and, having first been duly sworn, was examined and testified as follows:

MR. PELCYGER: Your Honor, I think it might be helpful to set the stage for Mr. Stetson's testimony and also to hopefully avoid some matters that may unnecessarily prolong it for me to talk briefly about two seconds.

The first deals with one part of Mr. Stetson's testimony relating to the irrigability of the land to the six Indian reservations that we are discussing here, and the water requirements of those lands.

It is the position of the Bands that the Federal Power Commission doesn't have authority to determine what lands on the Indian reservations are irrigable; what lands are not irrigable; what the water requirements of those lands are; in other words the measurement of the Indians [sic] water rights.

Our understanding of Section 4(e) of the Federal Power Act is that Congress has specifically stated and delegated that function to the Secretary of the Interior. Since it is the Secretary of the Interior and not the Federal Power Commission who is authorized and required to impose conditions [1817]* on any license, that may be issued to ensure that

*Numbers found within brackets refer to the page number of the original transcript.

the reservation and its resources are adequate and protected and utilized.

Now in response to the question that your Honor raised during the first morning of hearings, Mr. Stetson's testimony on the subject of irrigability of the Indians [sic] lands and their water requirement, is submitted for the purpose of informing the Federal Power Commission, informing the parties to this proceeding what the irrigable lands are, what their water requirements are and what the Secretary of the Interior takes them to be. Not for the purpose of submitting those issues for determination by the Federal Power Commission.

It is for that reason that we believe that the rebuttal testimony offered by Mutual and Vista's witness Mr. Powell, is irrelevant to the issues before the Federal Power Commission.

In other words that information —

PRESIDING JUDGE: — Is Mr. Stetson's testimony irrelevant also?

MR. PELCYGER: No, your Honor. I said the testimony is relevant to show — for information purposes to show the Federal Power Commission and the parties the basis upon which the Secretary of the Interior is asking and imposing if he has to, conditions on any new license that might issue.

PRESIDING JUDGE: Have any such conditions been announced [1818] yet by the Secretary?

MR. PELCYGER: I believe the Secretary has recited provisions which would be applied to the previous license — to the existing license — but has not been called upon and has not yet in any of them, made known his position with respect to any new positions.

PRESIDING JUDGE: If your views are correct why am I listening to this man here?

MR. PELCYGER: Your Honor, I am hoping that if I am correct we can cut down considerably on cross examination. I am just offering that in evidence.

PRESIDING JUDGE: You can't give a lot of testimony and then just say after all, it is really irrelevant and not allowed to have any cross.

MR. PELCYGER: I am not saying it is irrelevant. I am not saying that we don't have any cross, that is a matter up to your Honor. I am certainly not saying it is irrelevant but what I am saying is that it is submitted for informational purposes; it is certainly —

PRESIDING JUDGE: — I don't want any information except information that will help the Commission carry out its job.

MR. RANQUIST: We do take the position, your Honor, that if this information is important and necessary to you, in making your determination of what the most and best comprehensive development of what the watershed should be, you have every [1819] right to —

PRESIDING JUDGE: — So what is this problem? This leaves me up in the air. He says it is only for information; you say it is for something important to help decide something under the law. Will you two get together?

MR. RANQUIST: I think Counsel agrees with me on the fact that you can take it in consideration in determining what the benefits should be to the Indian bands.

PRESIDING JUDGE: Is it relevant, Mr. Pelcyger, to the inquiry, what is the best and comprehensive use of the river?

MR. PELCYGER: Yes, sir, I believe it is relevant.

PRESIDING JUDGE: So if it is submitted for that purpose then it is subject to cross examination and rebuttal for that purpose.

MR. PELCYGER: I don't deny that it is subject to cross examination. They can introduce all rebuttal that anybody wants to, I am just indicating what our position is with respect to 4(e) of the Act and how does it affect the Secretary of the Interior under Section 4(e).

PRESIDING JUDGE: Which section of 4(e) — it is an awfully long page — which part of 4(e) are you telling me it is up to the Secretary?

MR. PELCYGER: I believe it is the second clause of the first proviso. The entire proviso is what I am referring to.

PRESIDING JUDGE: The first proviso requires a finding [1820] by the Power Commission.

MR. PELCYGER: Yes.

The second proviso states that any license issued by the Commission shall be subject to and contain such conditions as the Secretary of the Department under whose supervision such reservations fall shall be necessary for the adequate protection and utilization of such reservation.

PRESIDING JUDGE: Now the license we are talking about is the non-power license?

MR. PELCYGER: No, your Honor. The license that we are talking about in connection with Section 4(e), is the application for a new license which will contain those conditions.

PRESIDING JUDGE: The Secretary doesn't present any conditions that he regards as necessary then I don't have to put any in, do I?

MR. RANQUIST: That would be correct. We haven't yet been requested to submit any conditions on such a license.

PRESIDING JUDGE: I hereby state that they are not in as part of your case in chief; whether or not in at all.

Obviously the Secretary of the Interior is free to do what the law tells him. To whatever this means he is free to do it subject to such conditions as the Secretary shall be [sic] necessary.

We shall be delighted to hear from the Secretary what conditions he deems necessary and shall expect them as part of [1821] the Interior's case in chief.

MR. WOODS: Your Honor, if you read the last proviso in toto, it says "That licenses shall be issued within any reservation only after a finding by the Commission but the license shall not interfere and be inconsistent with the purposes for which such reservation was created or acquired, and" goes into the statement honorable Counsel made.

I think it would be necessary in order to make this finding by the Commission to have all these [sic] testimony before us. That is my point.

PRESIDING JUDGE: I am driving at the point that the Secretary wants conditions he better tell us what they are.

It says here the license shall contain the conditions. Shall contain certain conditions.

In other words be included within the license.

MR. WOODS: Yes, sir. It says the Commission has got to make a finding that any license issued would not be inconsistent with the purpose which, and it says, shall be subject to —

PRESIDING JUDGE: — That is another subject. Your point is correct that under that first we obviously have to have all the information we can get.

My point under the second one is a different point and is this, that the license must contain it says, the Department's conditions. You can't very well contain them if the De-

partment withholds them from us and doesn't tell us what they are.

[1822] MR. RANQUIST: We will not withhold them from you.

We do believe that we are entitled to listen to the entire proceedings and get the determinations on your part whether or not you believe the new license as applied for would be inconsistent with the purposes for which the Indian reservations are created and then I believe we can supply you with the conditions necessary for the license.

PRESIDING JUDGE: I don't understand this Alfonse and Gaston business going on again. It says here, and shall contain such conditions.

Now it seems to me that the Commission is entitled to know what those conditions are when the Commission comes to a decision on whether the license containing those conditions is inconsistent with the purpose of the reservation and is otherwise in accord with the law.

MR. RANQUIST: And we propose that the Interior should be permitted to correct those conditions at the end of the hearing after all the evidence is in so that we will know as well as you, as to what all the facts are.

PRESIDING JUDGE: That may well be, but it can't be at the end of the hearing because those conditions are themselves required to be subject to a hearing.

MR. WOODS: The Commission, your Honor, did consolidate all the dockets including the part of the Interior's complaint to be heard at a consolidated proceeding, with all the facts [1823] of course, and for a determination by you.

PRESIDING JUDGE: Didn't you hear me preaching the other day about I don't want a whole lot of computations brought in in the brief after the hearing is over and the other

side has not had a chance to test them?

It is just plain elementary for me to require by the second Morgan case if you want a citation, that Ohio Telephone said the other day, I said the other day, and a dozen others I could find you, obviously if the Secretary of the Interior wants some conditions they've got to be in here at a time which permits all sides to study them and rebut them, hear them, cross examine them, argue against them, propose counter conditions and so on.

MR. RANQUIST: Let me state we have filed the conditions that were necessary for the license and in that letter I believe we indicated that these were essentially the conditions that we thought should be included in a new license but that they may be supplemented. That was submitted to the licensee and they were requested to respond to that. They have responded to that and that is part of the issues upon which our evidence here is predicated.

Now we don't say that there might not be something more that we would want to ask.

PRESIDING JUDGE: That is fair enough, but just bear in mind that I can't have this after the hearing is over coming [1824] in with some bright new conditions that nobody has heard about and has no chance to rebut. If we are going to keep this thing evidently going on for years, why, that is the way to do it. We will get some more conditions and we will have to have some more hearings.

MR. PELCYGER: Your Honor, let me point out that Mr. Stetson's testimony here does set forth the conditions that he believes are necessary to insure the adequate protection and utilization of the various Indian reservations and I would imagine that will be the subject of some cross examination.

PRESIDING JUDGE: He is telling us conditions that he proposes that the Secretary requires?

MR. PELCYGER: He is telling us his opinion as an expert as to what conditions are necessary to assure the adequate protection and utilization of the resources of the various reservations.

MR. RANQUIST: I think actually he is giving you the evidence behind which we have corrected some of the conditions we have.

PRESIDING JUDGE: Then we might have some more.

MR. RANQUIST: Yes, sir.

**Excerpt From Reporter's Transcript of November 13,
1973 (Cross-Examination of Bands' Witness Stet-
son) [16 TR 3327 (line 13) - 3329 (line 21)].**

Q [BY MR. ENGSTRAND] Yes. Now, my question is, do you know of any time when there was insufficient water to meet the needs of the Indians in the last fifty years?

A [Stetson] Well, I have been told that there has been shortages on the Rincon reservation, that wells have been — have practically gone dry, and some wells have gone dry. But I have no firsthand knowledge of it.

Q Now, have you in your study of the hydrology of the area found any time when there was not underground water under the Rincon Reservation sufficient to meet any needs that the Indians had at that time?

A There may have been water underground. Whether they [3328]* had access to it by an existing well, I couldn't say for sure.

Q I want to be specific about this, now, Mr. Stetson.

PRESIDING JUDGE: Is this the man to answer such a question, Mr. P?

MR. PELCYGER: I wouldn't have any objection to Mr. Stetson answering it to the best of his knowledge based upon hydrological conditions. Mr. Stetson is not an expert on what irrigation systems existed on the reservations, but I think the question was directed to was there water somewhere under the ground. This would be the witness.

PRESIDING JUDGE: All right.

BY MR. ENGSTRAND:

*Numbers found within brackets refer to the page number of the original transcript.

Q Wells go dry or become inoperative for many reasons, do they not?

A Yes, they do.

Q And would you give us just a few of those reasons?

A Well, there can be a collapsed casing, there can be a situation where the water table declines to the point where it drops out from under the existing depth of a developed well.

Q And those, I take it, are the two main reasons that a well becomes inoperative?

A Yes.

Q Now, if there is water supply below the depth to [3329] which the well has been drilled, then of course you can deepen your well and lift the water a little higher and get the water that is there, can you not?

A Yes. So long as the water table doesn't recede away from the overlying land, you can usually deepen the well and continue to reach the water table and pump.

Q Now, do you know of any time in the last fifty years when there was not sufficient water underlying the Rincon Reservation so that a well drilled deep enough could not have secured water to meet the needs of the Indians?

A Of the Indians as they then existed?

Q Yes.

A No, I don't know of any time that that occurred.

Are you confused by whether the answer should be no or yes?

Q Yes.

A I think I am too. Let me put it this way: I don't know of any time that the water table under part of the Rincon Reservation could not have been tapped by a well, either deepening a well or drilling deeper — a new well.

**Letter Dated November 14, 1973, From W. W. Lyons,
Deputy Under Secretary of the Interior, to Kenneth
F. Plumb, Secretary of the Federal Power Com-
mission (Exhibit I-78).**

Exhibit I-78.

[Letterhead]

United States Department of the Interior
Office of the Secretary
Washington, D.C. 20240

[SEAL]

NOV 14, 1973

Dear Mr. Plumb:

During the course of the recent hearings on Federal Power Commission license No. 176 and Docket Nos. E-7562 and E-7655, Presiding Administrative Law Judge William L. Ellis made a specific request of the Secretary of the Interior to advise the Commission of those conditions the Secretary deems necessary to impose upon the issuance of any new license for Project No. 176 to someone other than the Indian Bands or if there is no recapture by the United States. In addition to setting forth the actual conditions, we will also include in this letter a short statement of the reasons for the conditions. The reasons stated in this letter are not intended to be exhaustive. The conditions are supported by the entire record in the Project No. 176 proceeding.

Pursuant to the provisions of Sec. 4(e) of the Federal Power Act, 49 Stat. 839, as amended, 16 U.S.C. §797(e), the Secretary of the Interior deems the following conditions necessary for the adequate protection and utilization of the La Jolla, Rincon, San Pasqual, Pauma, Yuima and Pala Indian Reservations:

1. That Henshaw Dam, Lake Henshaw, the lands owned by the Vista Irrigation District overlying the ground-water basin upstream of Henshaw Dam including the wells located on such land and any government land subject to inundation by Lake Henshaw or occupied by Henshaw Dam be included as part of the Project No. 176 project works.

Reasons: Lake Henshaw effectively controls the upper reaches of the San Luis Rey River and provides the only storage facility upstream from the Indian reservations. The operations of Lake Henshaw and the groundwater basin are thoroughly and intimately intertwined with the operations of Project No. 176. Inclusion of Lake Henshaw and the ground water basin in the project works for Project No. 176 is necessary in order for this Department and the Federal Power Commission to insure that the Indian reservations will be provided with water at the times and in the quantities required to meet their agricultural, domestic and other needs. Inclusion of Lake Henshaw and the ground water basin is also required in order to assure the maintenance of adequate stream flows for the La Jolla fishery and campground upstream from the intake works.

2. That the Vista Irrigation District agrees to be subject to the terms and conditions of the license. That Vista Irrigation District further agrees to be subject to the jurisdiction and control of the Federal Power Commission and the Department of the Interior with respect to the terms and conditions of the license and to Vista's use, occupancy and enjoyment of the lands of the La Jolla, Rincon and San Pasqual Indian Reservations in connection with Project No. 176 operations. That the Vista Irrigation District further agrees to pay annual charges, pursuant to section 10(e) of the Federal Power Act, 16 U.S.C. §803(e), in an

amount to be fixed by the Commission, for its use, occupancy and enjoyment of the Indian land involved in Project No. 176.

Reasons: The Vista Irrigation District, along with the Escondido Mutual Water Company, exercises control over the flow of the San Luis Rey River upstream from the Indian reservations and through the Escondido conduit. In order to protect the Indian reservations and to secure the quantity of water adequate to fulfill their needs at the times required, it is essential for the Department of the Interior, as well as the Federal Power Commission, to exercise jurisdiction and control over the Vista Irrigation District in its use of the project.

For the past 50 years, the Vista Irrigation District, has, along with the Escondido Mutual Water Company, enjoyed the use, occupancy and possession of the government and Indian land involved in Project No. 176. Vista has not paid either the United States or any of the affected Indian Bands any annual charges for the use and occupancy of these lands. The Vista Irrigation District must agree to pay such annual charges, in an amount to be fixed by the Commission, for as long as it uses, occupies, enjoys or possesses any of the government or Indian lands involved in Project No. 176.

3. That the Escondido Mutual Water Company and the Vista Irrigation District agree that they shall not infringe upon or interfere in any manner with the right of the Indian reservations to divert the following annual quantities water:

	25-year Annual Average	Maximum Annual Diversion
(a) La Jolla	4,990 acre feet	7,285 acre feet
(b) Rincon	11,140 acre feet	16,590 acre feet
(c) San Pasqual	3,590 acre feet	5,210 acre feet
(d) Pauma/Yuima (not including Mission Reserve lands)	630 acre feet	945 acre feet
(e) Pala (not including Mission Reserve lands)	14,130 acre feet	20,570 acre feet

The Escondido Mutual Water Company and the Vista Irrigation District must recognize in their operations on the San Luis Rey River watershed that the reserved and other rights of the Indian reservations to the foregoing quantities of water from the San Luis Rey River shall at all times be prior and paramount to any and all rights of the Escondido Mutual Water Company and the Vista Irrigation District to the waters of the San Luis Rey River.

Reasons: The quantities of water specified in this condition were computed as follows:

(a) La Jolla: average annual quantity (4,990 a.f.) — 4,590 a.f. for irrigation (from Exhibit B-41) plus 300 a.f. for domestic (from Exhibit B-43) plus 100 a.f. for stock (from Exhibit B-40, p. 13); maximum annual quantity (7,285 a.f.) — substitute 6,885 a.f. (Exhibit B-42) for 4,590 a.f. for irrigation.

(b) Rincon: average annual quantity (11,140 a.f.) — 10,900 a.f. for irrigation (Exhibit B-41) as revised by direct testimony (Tr., v. 9, p. 1859), plus 40 a.f. for domestic (Exhibit B-43) plus 100 a.f. for stock (Exhibit B-40, p. 13) plus 100 a.f. for sand and gravel operations (Exhibit B-40, p. 13); maximum annual quantity (16,590 a.f.) — substitute 16,350 a.f. (Exhibit B-42) as revised by direct testimony, (Tr., v. 9, p. 1860) for 10,900 a.f. for irrigation.

(c) San Pasqual: average annual quantity (3,590 a.f.) — 3,240 a.f. for irrigation (Exhibit B-4 [sic]) as revised by direct testimony, (Tr., v. 9, p. 1860) plus 50 a.f. for stock (Exhibit B-40), (p. 13) plus 300 a.f. for domestic (Exhibit B-43); maximum annual quantity (5,210 a.f.) — substitute 4,860 a.f. (Exhibit B-42) as revised by direct testimony, (tr. [sic], v. 9, p. 1860) for 3,240 a.f. for irrigation.

(d) Pauma/Yuima: average annual quantity (630 a.f.) — 570 a.f. for irrigation (Pauma) (Exhibit B-41) plus 60 a.f. for irrigation (Yuima) (Exhibit B-41); maximum annual quantity (945 a.f.) — 855 a.f. (Exhibit B-42) plus 90 a.f. (Exhibit B-42) for irrigation.

(e) Pala: average annual quantity (14,130 a.f.) — 12,880 a.f. for irrigation (Exhibit B-41) plus 1,050 a.f. for domestic (Exhibit B-43) plus 100 a.f. for stock (Exhibit B-40, p. 13) plus 100 a.f. for sand and gravel operations (Exhibit B-40, p. 13); maximum annual quantity (20,570 a.f.) — substitute 19,320 a.f. (Exhibit B-42) for 12,880 a.f. for irrigation.

This Department recognizes that the water rights as between the Indian reservations and the Escondido Mutual Water Company and the Vista Irrigation District are in dispute. They are the subject of litigation pending before the United States District Court for the Southern District of California. However, regardless of whatever legal entitlements may be found to exist currently, this Department asserts that if the Escondido Mutual Water Company and the Vista Irrigation District seek to obtain from the Federal Power Commission in a new license the right to the use of the Indian and government lands involved in Project No. 176 for another period of up to fifty years, they must agree to recognize the rights of the Indian Bands set forth in condition 3 and agree not to interfere or infringe upon those rights in any way. The new license would represent new benefits to Mutual and Vista as to which there must be new conditions.

The language of this condition parallels the language of a resolution adopted by the Escondido Irrigation District, predecessor to the Escondido Mutual Water Company, dated April 3, 1894 (attachment 6-12 to Exhibit A-1, Stipulation of Facts). The Irrigation District agreed as a condition precedent to being permitted to divert the waters of the San Luis

Rey River that it would not interfere with the water rights of the Indians and would recognize that the Indians' water rights were considered prior to its own. That was the condition this Department originally insisted upon before permitting the exportation of San Luis Rey River water out of the watershed and that is the condition which must attach to any new license — any exportations of water cannot be detrimental to the Indians' water rights.

This condition is also supported by, and consistent with, the reserved or Winters' Doctrine rights of the Indian Reservations. *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 600 (1963); and *United States v. Ahtanum Irrigation District*, 236 F. 2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 330 F. 2d 897 (9th Cir. 1964), 338 F. 2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924.

4. That the Secretary of the Interior reserves the right to impose conditions on the operations of Project No. 176 that are necessary to protect and utilize the water supply available to, and required by, the lands of the Mission Reserve.

Reasons: The quantities of water specified in condition number 3 do not take into account the lands of the Mission Reserve which, it is anticipated, will soon be formally added to the Pala and Pauma Indian Reservations. A large part of the Mission Reserve consists of rugged, forested [sic] mountains far enough removed from the San Luis Rey River as to be unaffected by the operations of Project No. 176.

However, if it is subsequently determined that any of the Mission Reserve lands are irrigable or require the use of water for other purposes, and that the exportation of San Luis Rey River water out of the watershed through

Project No. 176 facilities adversely affects the water supply available to these lands, the Department reserves the right to impose conditions on the operations of Project No. 176 that are necessary to protect and utilize the water supply available and required by the lands of the Mission Reserve.

5. That no water pumped from the underground basin above Lake Henshaw shall be transported through the Project No. 176 facilities without the prior written agreement of the La Jolla, Rincon, Pala, Pauma and San Pasqual Bands of Mission Indians which shall be subject to the approval of the Secretary of the Interior.

Reasons: The pumping of the basin above Lake Henshaw for the past 23 years by the Escondido Mutual Water Company and the Vista Irrigation District has severely altered the regimen of the San Luis Rey River and the quantity of inflow into Lake Henshaw. This in turn has adversely affected the water rights of the Indian reservations, particularly the Rincon Reservation. If water is to be pumped from the basin above Henshaw, then it must be on terms and conditions that are satisfactory to this Department and to the Indian Bands. Rather than specify these conditions, which are apt to be very complex, in advance, this Department believes that the matter is best handled at this stage by prohibiting transportation of pumped water unless and until the Indian Bands and the Escondido Mutual Water Company and the Vista Irrigation District are able to reach an agreement which would be subject to the approval of the Department of the Interior.

6. That the Escondido Mutual Water Company and the Vista Irrigation District agree that the La Jolla, Rincon and San Pasqual Bands of Mission Indians have

the right at all times to take from the Escondido conduit water for agricultural, domestic, recreational or other purposes or for purposes of recharging the groundwater basin upon which the Rincon Reservation relies and that the Escondido Mutual Water Company and the Vista Irrigation District will provide water for such purposes at the times and in the amounts specified by the Secretary of the Interior on an annual basis. The Escondido Mutual Water Company and the Vista Irrigation District must agree to release water either at the intake or at the Rincon penstock for the purpose of recharging the Pauma and/or Pala groundwater basins at the times and in the amounts specified by the Secretary of the Interior on an annual basis. The Escondido Mutual Water Company and the Vista Irrigation District must agree that they will provide such water from any and all sources, including storage in Lake Henshaw, in satisfaction of this condition, and that the Indian Bands shall not be limited to the so-called natural flow of the San Luis Rey River. The quantities supplied to the Indian Bands shall not exceed the quantities specified in condition 3 above except when, in the opinion of the Secretary of the Interior, larger quantities are required for recharge purposes.

Reasons: This condition is necessary for the conduit is a convenient and economical way to deliver water to all or portions of the La Jolla, Rincon and San Pasqual reservations. The language of this condition regarding releases of water from the conduit to these three reservations parallels the provisions of section 8 of the Mission Indian Relief Act of January 12, 1891, 26 Stat. 712, 714. Additional releases may be required for recharging the Pauma and Pala groundwater basins upon which the Rin-

con, Pauma and Pala reservations rely. Since water stored in Lake Henshaw is transported through the reservations by Project No. 176 facilities, the Indian reservations should be able to utilize this source of water as well as any other water that flows through the Project. The owners and operators of Lake Henshaw, now the Vista Irrigation District, have never provided any consideration whatsoever, financial, storage rights or otherwise, to the Indian Bands for their use and enjoyment of the Indian lands included in Project No. 176.

The Department recognizes that there is presently a large draft on the groundwater of the San Luis Rey River system by non-Indian users downstream from the Rincon Reservation. This condition might require the Escondido Mutual Water Company and/or the Vista Irrigation District to supply sufficient water to this area for the use and benefit of the Rincon, Pauma and Pala Indian Reservations in order to prevent overdraft of their groundwater basins. In that process, the non-Indian users might also benefit. The Escondido Mutual Water Company and/or the Vista Irrigation District might choose to limit the pumping of the non-Indians and thereby limit the amount of water required for recharge purposes, by some appropriate legal action undertaken singly, jointly, or in conjunction with the United States and/or the Indian Bands. The Vista Irrigation District has already assumed this obligation, in partial consideration for obtaining the approval of the United States to the construction of Henshaw Dam, by virtue of section 5 of the June 28, 1922 contract between the United States and William G. Henshaw.

7. That the Vista Irrigation District agrees to fulfill its obligations to the Pala Indian Reservation pursuant to section 6 of the June 28, 1922 contract between the United States and William G. Henshaw by drill-

ing a well or wells upstream of the Pauma Narrows so that a flow of six cubic feet per second from said well or wells is delivered to the Pala Reservation. Provided however, that if the Vista Irrigation District chooses to supply water to the Pala Indian Reservation from a source other than the San Luis Rey River such arrangements may be negotiated between the Vista Irrigation District and the Pala Band of Mission Indians subject to the approval of the Secretary of the Interior.

Reasons: See Exhibit B-40, pp. 41-47.

8. That the portion of the Escondido conduit that passes through the San Pasqual Indian Reservation be converted to an underground pipe within two years after a new license is issued. Provided however, that the Escondido Mutual Water Company propose other methods of eliminating the hazardous and dangerous conditions posed by the Escondido conduit as it traverses the San Pasqual Indian Reservation, any alternative shall have the prior written approval of the San Pasqual Band of Mission Indians and the Secretary of the Interior before being implemented.

Reasons: The open canal which traverses the San Pasqual Indian Reservation poses a hazardous and dangerous condition. The open canal also severs and makes it more difficult to develop the best lands on the San Pasqual Indian Reservation. It appears that the best solution to this problem would be for the canal to be replaced by an underground pipe. However, if the Escondido Mutual Water Company has alternative suggestions, they can be considered by the San Pasqual Band and the Department of the Interior.

9. That the grant of any right of way for Project No. 176 across Indian lands shall not preclude agricul-

tural or other use by the Bands of the land included within the right of way that is not actually utilized for the facility itself. Provided however, that the Bands shall not erect permanent structures which would interfere [sic] with or obstruct the licensee's access to project facilities; and further provided that the licensee agrees to hold harmless the Band, any Band members, or their agents, employees, or assigns for any damages to agricultural crops or other damages that may be caused by the maintenance or repair of project facilities on Indian land by the licensee.

Reasons: The Escondido Mutual Water Company has not respected the land owned by the Indian Bands and the government. The widths of rights of way used in the past have been excessive; rights of way for a road or pack trail crossing both Indian and private land are typically substantially wider on Indian land, with no apparent explanation; many facilities, including roads, telephone lines and portions of the conduit, have been abandoned and/or relocated without the prior consent of, or even notification to, the affected Band, the Commission or the Department. The widths of the rights of way required by the Bands were they to operate the project facilities are set forth in the K exhibits to their application for a non-power license. The Department believes these widths would be adequate for any new license.

10. That no use shall be made of the La Jolla, Rincon or San Pasqual Indian Reservations in connection with project No. 176 operations that has not received the prior written approval of the affected Band, the Interior Department and the Federal Power Commission.

If a new license is issued, the United States and the Indian Bands are entitled to compensation, in the form of annual charges, to be fixed by the Commission pursuant to Sec. 10(e) of the Federal Power Act, 16 U.S.C. §803(e). The conditions set forth in this letter assume that such charges will be fixed by the Commission and paid by the Escondido Mutual Water Company and the Vista Irrigation District. Two of the factors that should be taken into account in determining the amount of annual charges are that the Rincon power plant is on the Rincon Reservation and that it is Rincon water that is used to generate the power.

The Department believes that it is necessary for the adequate protection and utilization of resources of the La Jolla, Rincon and San Pasqual Indian Reservations for these respective Bands to control the use of their tribal lands. This right, with respect to rights of way for ditches, canals, flumes, etc., which are involved in Project No. 176, was specifically recognized or conferred by section 8 of the Mission Indian Relief Act, 26 Stat. 712, 714, pursuant to which these reservations were established. This statute provides that after the issuance of a trust patent for the reservations, anyone desiring a right of way for a flume, ditch, canal, etc. may enter into a contract providing for a right of way with the Indian Band which is subject to the approval of the Secretary of the Interior. The Department believes that section 8 of the Mission Indian Relief Act, read *in pari materia* with the Federal Power Act, requires the consent of the Rincon, La Jolla and San Pasqual Indian Bands before any rights of way can be authorized for canals, ditches, flumes, etc. through their respective reservations.

At this time, the Department expresses no view with regard to whether the conditions previously enumerated should be included directly in any new license that might issue for Project No. 176 or should be set forth in a separate

contract which would then be incorporated and made a part of the license. The Department insists only that whatever arrangement is selected will be proper and legally binding and will achieve the Department's purposes.

The Department reserves the right to change or modify the conditions set forth in this letter on the basis of the developing record in the Project No. 176 proceedings in fulfillment of the trust responsibilities of the United States. Also, the Indian Bands may agree to waive the conditions set forth in this letter in return for consideration, provided that any such agreement is subject to the approval of the Secretary of the Interior.

The Department of the Interior supports, in the alternative, either the recapture of Project No. 176 or the issuance of a non-power license to the La Jolla, Rincon, San Pasqual, Pauma and Pala Indian Bands. The Department of the Interior and the Indian Bands oppose and have refused to acquiesce in the Escondido Mutual Water Company's application for a new license. The conditions set forth in this letter do not alter the Department's or the Band's position with respect to these matters.

Sincerely yours,
(sgd) W. W. Lyons,
Deputy Under Secretary
of the Interior

Honorable Kenneth Plumb
Secretary
Federal Power Commission
Washington, D.C.

Excerpts From Reporter's Transcript of November 15, 1973 (Colloquy of Counsel and ALJ Re Exhibit I-78) [18 TR 3839 (lines 20-25); 18 TR 3840 (lines 11-15); 18 TR 3841 (line 9) - 3843 (line 12)].

MR. RANQUIST: Now, before going into Mr. Kunkel's testimony we would like to submit to the court the requested — your request for conditions from the Department of Interior as to those conditions which the Department would request be included in any new license issued to anyone operating this project other than a non-power license to the Indian Bands.

[3840*] * * *

MR. RANQUIST: I want to make it clear this exhibit has nothing to do with this witness' testimony. It is just that we wanted you to receive this document as early as possible after it was signed by the pertinent officials in the Department of Interior.

* * *

[3841] * * *

(THE DOCUMENT REFERRED TO WAS MARKED AS EXHIBIT I-78 FOR IDENTIFICATION)

MR. RANQUIST: Your copy shows stamped on it the hour and date of filing before the Federal Power Commission, which was during our last break.

MR. WOODS: Your Honor, might we ask the distinguished counsel from Interior if he is going to put a witness on who will support these conditions or give us some chance to cross-examine as to their needs?

MR. RANQUIST: Your Honor, these conditions as is stated in the conditions themselves is based upon the entire

*Numbers found within brackets refer to the page number of the original transcript.

record. There is also stated the reasons or purposes behind each of the conditions which accompany them in the document. But it is the entire record of this proceeding upon which those conditions are based.

MR. WOODS: Fine, your Honor, but I would think we would want to cross-examine somebody about this situation. [3842] Here he is putting an exhibit in, he is telling the Federal Power Commission that if you are going to license anybody in this other than recapture it then you have got to have these conditions. I think that is what is [sic] says, isn't it?

MR. DUNCAN: I think Staff Counsel has a good point.

PRESIDING JUDGE: I am sure they will have someone available. Our distinguished Department of Interior would be glad to explain why we want this, why that is a good idea, surely.

MR. RANQUIST: If that is necessary after reading the document itself, which is self-explanatory, then the Department would agree to produce a witness for the purpose.

PRESIDING JUDGE: Yes. I am sure there would be no problem.

MR. WOODS: Thank you.

MR. RANQUIST: I wanted to make it clear that we don't believe that it is necessary and that the need therefore would have to be established.

MR. PELCYGER: Your Honor, let me just say that the matters that are contained in this letter have been extensively inquired into on cross-examination of witnesses that have already appeared here, and there is nothing new or nothing that should surprise anyone.

MR. DUNCAN: I am not so sure that is the case.

PRESIDING JUDGE: How do you know all this? This is a [3843] letter from the Interior Department addressed to

the Plumb — Plumb, the man that works at the Power Commission. And it is dated on yesterday and it shows it was delivered about an hour ago.

MR. PELCYGER: I have read the letter, your Honor.

MR. RANQUIST: You can assum [sic], your Honor, that since this refers to the Indian reservation; these conditions are for the protection of those Indian reservations, that certainly counsel for the Indian reservations had their opportunity for comment and input in the contents of that letter, since we are fulfilling a trust capacity with regard to those bands.

Excerpt From Reporter's Transcript of November 15, 1973 (Direct and Cross Examination of Interior's Witness Kunkle) [18 TR 3857 (line 25) — 3861 (line 25); 18 TR 3878 (lines 8-14)].

Witness [Kunkle]:

Now, what I attempted to do on this exhibit [?] [sic] is to [3858*] recover the highest water level of any record that I could find, knowing that under natural conditions the inflow to the system was equal to the outflow plus or minus any change in storage. And under natural conditions there is virtually no change in storage, or over a long period of time there is virtually no change in storage.

Therefore, the oldest or the highest record that I could recover would indicate to me that water levels were at least that high under natural conditions; they probably were [sic] higher if it is a recent measurement. But they certainly were not any lower under natural conditions.

And on the basis of those water level measurements I calculated the altitude of the water surface, that is, the difference between the depth to water and the altitude of land surface and calculated the altitude of the water surface.

BY MR. RANQUIST:

Q And this is what is known as a water contour?

A And from those data points I prepared contours. Those contours are shown as solid line — on the legend it says shallowest recorded water level, approximately natural conditions. And these contours are shown on both the Pala and the Pauma ground water basins.

I then in the fall, the autumn of 1971 I measured as many wells as I could. Many of them were the same wells that

*Numbers found within brackets refer to the page number of the original transcript.

had been measured earlier, many of them had never been measured [3859] before. We measured those for the first time. And on the basis of those data points I constructed water level contours showing the altitude of the water surface in feet above mean sea level for autumn 1971, and those are dotted lines on the same ground water basins.

Then next to the wells that I relied on as my data points I put a fraction. The upper number is the altitude — is the measured water level decline in feet from the shallowest level of record as of autumn 1971. In other words, if I had two measurements, one of them prior to '71 and one of them in '71, and there was a decline shown, I indicated what that decline was. The lower number is the maximum decline from the highest water level of record. And what this map now documents in two forms are — if anyone takes a water level contour, say the 700-foot contour for 1971 through Pauma Valley is shown, and the highest water level of record is shown as the solid line. And the 700- and 750-foot contours are virtually one on top of the other, indicating that even following the wet winter of 1969 — '68 or '69 when the recovery of water levels did take place there was still a residual loss of at least 50 feet in this area. In part of the area it was a loss of greater than 50 feet.

The water level data in the Pala Reservation do not show a substantial loss of water levels during that period. There is some, but it is mainly in the area in the central part of [3860] the basin and it is a matter of the difference between approximately 27 and 33 feet, about 6 feet of decline.

What this means to me is that under current operating condition, under the current climatic conditions, the quantity of water going into the system is less than the quantity of water going out of the system. The quantity of water going out of the system is natural evapo-transpiration, natural drainage out of the system, pumpage, whatever draft there

was on the ground water body was greater than the precipitation — than the wet precipitation of '68-'69 allowed recovery to take place.

In other words, I shy away from the term overdraft. However, more water was taken out of the system than went into it during that period.

PRESIDING JUDGE: How long a period?

THE WITNESS: Well, from whenever natural conditions were. It is reasonable to assume that natural conditions probably existed in the late twenties, early thirties. So between the late twenties or early thirties to 1971, the operation of the whole system — also the draft on the system is also diversions out of the system. The total inflow was insufficient to make up the amount of water that was taken out.

PRESIDING JUDGE: I just don't follow you because it is obvious, we saw this conduit they have got taking water out [3861] of the system.

THE WITNESS: Yes.

PRESIDING JUDGE: Tremendous. It is that wide and it is flowing just as fast as it can go so obviously you are losing a lot of water out of the system.

THE WITNESS: This is what I am saying, that the rainfall and run-off for the rest of the basin is not sufficient to recharge the ground water body. In other words, there was a net decline or a net withdrawal [sic] of water from storage that was not made up during the period of heavy precipitation.

MR. RANQUIST: Your witness.

PRESIDING JUDGE: Aren't you going to ask him the obvious question in view of what he just said? I thought you would want to so I didn't. If you don't want to, I will ask him.

Does that mean if there hadn't been any conduit this conclusion would not have occurred?

THE WITNESS: In my opinion, if there had been no conduit, it might have occurred; it would not have been as bad. Now whether it would have been sufficient to make up the total deficiency I don't know. But certainly it was one of the elements that caused the decline.

CROSS EXAMINATION

BY MR. ENGSTRAND:

Q You mean if you take water out of the watershed you don't have it in the watershed?

A That is about what it comes down to.

* * *

[3878] Q Now, is there any time between 1920 and May 10th, 1972, when if someone would have drilled water wells on the Rincon Reservation similar to the one you have marked on I-39 as 26N1, that you would have reasonably expected them to get a good well like they got in 1965?

A That is right. Any time that they would have drilled it they would have gotten a similar well.

**Excerpt From Reporter's Transcript of November 16,
1973 (Recross-Examination of Interior's Witness
Kunkle [19 TR 4000 (line 23) - 4001 (line 15)]).**

Q By Mr. Engstrand: And you know that they haven't used the water that underlies their reservation for the last 50 years to anything near the capabilities of the ground water supplies under their [4001*] reservation, don't you?

MR. PELCYGER: Your Honor, this witness has not testified and has not studied that problem, hasn't testified concerning it. And there are plenty of other testimony in the record on that issue.

PRESIDING JUDGE: If he doesn't know, all he has to do is say so. That is fair enough.

Do you know all that that [sic] the man said, or do you not know?

THE WITNESS: From my own observations it is apparent that there is additional water for development by the Indians if they pump the ground water basin.

BY MR. ENGSTRAND:

Q And that has been the case for the last 50 years, hasn't it?

A Yes.

*Numbers found within brackets refer to the page number of the original transcript.

Excerpt from Additional Prepared Testimony of Interior's Witness Finale Filed November 16, 1973 [Exhibit I-77 pp. 2 (line 16) - 5 (line 5)].

Q. Have you had the official records of the Bureau of Indian Affairs checked to determine when the Department of the Interior drilled wells on the Rincon, Pala and Pauma Indian Reservations?

A. Yes.

Q. What does the record reveal as to the dates the wells were drilled, the depth of each well, the approximate date it ceased to be used, and the reason for abandoning it?

A. The records are sketchy but they do indicate that wells have been abandoned through the years on the Pala and Rincon Reservations because of the declining water table.

The original well at Pala was dug in 1912 and 1913 to a depth of 67' with an 8' diameter. The well was equipped to produce 1,700 gpm for irrigation use. The water supply was supplemented by the drilling of an additional well in 1955 to a depth of 134' with 20" casing and producing 1,550 gpm. This supplemental water supply was necessary due to the decreasing flow of water in the San Luis Rey River and subsequent lowering [sic] of the water table. Lowering of the water table increased to the point shortly after drilling of the supplemental well to the point that the original dug well was abandoned for use as an irrigation water supply.

The records show that in 1957 an eight inch well was drilled to a depth of 400 ft. on the Pauma Reservation. While it was hoped that enough water could be developed for irrigation, it was found not to safely

yield more than 20 gpm. The well was equipped with a pump of that capacity for domestic use.

The original wells on the Rincon Reservation were developed in 1913-1914. While Well #1 on the South bank of the San Luis Rey River was a dug well, the other wells were drilled to various depths between 49' and 67'. The wells were grouped together and pumped into the irrigation system by pumping plants adjacent to the well complexes. As the wells lost productivity due to the declining water table, replacement wells were drilled. Attempts to provide suitable water supplies by deepening of various of the wells proved to provide no more than temporary relief of the situation. The present operating wells on the Rincon Reservation are a domestic well drilled in 1963 and the irrigation well drilled in 1966. The domestic well is 244' deep and 16" in diameter. This well was developed after the drilling of five other holes which proved unproductive.

The irrigation well is a good well producing 1,600 gpm from a 24" hole 134' deep drilled to total depth of 230'. This well was developed after drilling at three unproductive sites. A Table entitled "Tabulation of Wells Constructed by the United States, Rincon, Pala and Pauma Reservations", Exhibit I-78, has been prepared by my staff which shows the date of development, depth, size, yield, and comments, if any on these wells.

- Q. Can these older wells which are not now being used on these reservations be used today if pumping equipment were installed?
- A. No. These wells have water in them only intermittently and then in insufficient amounts.

**Excerpts from Reporter's Transcript of November 26,
1973 (Colloquy of Counsel and ALJ Re Exhibit
I-78) [24 TR 5022-C (line 23) - 5064 (line 24)].**

MR. WRIGHT: Your Honor will recall on Tuesday of last week, immediately following the noon recess—we had spent most of the morning discussing the basis for and the impact [5022-D*] of the letter addressed to Mr. Plumb as Secretary of the Commission, from Mr. W. W. Lyons, the Deputy UnderSecretary [sic] of the Interior, and dated November 14, 1973, which is identified in these proceedings as I-78.

At the conclusion of the recess, the court summarized the morning discussion and suggested that it would be helpful to Interior if in response to the admonition of the Court asking for an exposition beyond those contained in the letter of the position of Interior in suggesting these conditions if Interior were to present one or more witnesses who might be able to explain more fully to the court and the parties the reasons for and the basis of the requests in the form of conditions which council for Interior has taken the position are matters which are mandatory upon the Commission and cannot be altered except by the Secretary of Interior.

This was a position with which I and I believe Staff Counsel and Counsel for Mutual disagreed. We had a short discussion concerning that. And it is now in response to the invitation that questions which the parties have as to each of the suggested conditions be brought out, be asked so that they could serve — those questions could serve as a guidance to Interior as to which of several bodies in Interior could best appear and satisfy the court and the parties as to the effect of, the scope of, the purpose [5023] for, and the

*Numbers found within brackets refer to the page number of the original transcript.

basis for the conditions.

I have tried to summarize the discussion that we had all one morning and the comments that the court made at the conclusion of that discussion. If I have misstated it, I would invite counsel for both the Staff, the Bands, and Interior to indicate any omissions as to the purpose of the comments I am about to make.

PRESIDING JUDGE: It sounds very good as far as I am concerned.

MR. RANQUIST: It is reasonably accurate.

MR. WRIGHT: Turning to I-78, I would suggest that we all have copies before us because I do not propose to discuss in any detail the reasons given for each of the conditions, the statutory background, or — but merely the condition itself and the comments which I have to make.

I might state further that these comments should be considered as coming from both Vista and Escondido. In order to minimize the time I in collaboration with Mr. Duncan over the holidays reviewed the conditions, roughed out our comments, and I have had an opportunity now to review them with MR. [sic] Engstrand, and he has concurred in the comments which I am about to make and indicated that in the main they would be his questions.

PRESIDING JUDGE: Our purpose is to assist the Interior in figuring out whom to send over. Is that the point?

[5024] **MR. WRIGHT:** Yes, sir.

PRESIDING JUDGE: Is that agreeable with you, Mr. Ranquist? That we hear their comments in this way as a guidance to you in whom you would pick out to come over and tell us about the conditions?

MR. RANQUIST: Yes, sir. To the extent that the present record doesn't resolve the questions they raise, we would provide them.

PRESIDING JUDGE: All right.

MR. WRIGHT: I would also indicate in advance I have not attempted to differentiate between those matters which counsel might consider have been covered adequately by the record. I am raising the questions that I have, and whether or not they are covered by the record, this is counsel's argument, they are still my questions. In other words, I haven't attempted to analyze the entire record or any particular part of it to see what of these might have been answered by that record in Interior's mind.

The first condition. This is the one which states that Henshaw Dam, Lake Henshaw, the lands owned by Vista Irrigation District overlying the ground water basin upstream of Henshaw Dam, including the wells located on such land — let's stop there — be included as a part of the project. Also — now those are all privately-owned facilities, and the water underlying the Warner Ranch.

[5025] The next category, any government lands subject to inundation by Henshaw or occupied by Henshaw Dam. That is the subject of I believe V-1, and also a subsequent exhibit submitted by Staff as to the interpretation of the areas involved, and it ties in with some of the Staff exhibits submitted in the earlier stages.

Our question: In view of the primary status of these lands as being in private ownership, facilities having been developed with private capital, owned privately, what is the legal basis for this jurisdiction asserted by the Interior, particularly in view of Farmington River Power Company versus the Commission?

MR. RANQUIST: Give us that citation, please.

MR. WRIGHT: Decided by the Second Circuit in January of 1971 or '72.

MR. RANQUIST: Could you give us the citation?

MR. DUNCAN: We will get the citation for you.

MR. RANQUIST: Thank you.

PRESIDING JUDGE: That is all right. Don't take the time now to find it. I am sure we can all get it for him conveniently.

MR. WRIGHT: Also uncertain is the extent of the lands which are owned by Vista which overlie the ground water basin upstream. That is not defined.

PRESIDING JUDGE: You mean the extent of the ground water [5026] basin is not clear? Is that the point?

MR. WRIGHT: No, the extent of the surface of the land for purposes of description. The District owns some 42,000 acres comprising the major portion of two land grants, Mexican land grants as set forth in the stipulation of facts. What portion of those lands are encompassed within Condition 1.

Secondly, what residual land uses are to be permitted the owner of those lands which are so included within the scope of the project? Are any resales of all or any portions of those lands to be permitted? Or are they in effect by this order dedicated forever to the public use?

Secondly, what competing overlying water uses may be made? The lands are riparian on the San Luis Rey River. That riparian right had its origin in the Spanish Land Grant which was confirmed in the Treaty of Guadalupe Hidalgo and two United States Supreme Court cases which confirmed the Spanish grants as against the claims of, one, the Department of Interior, and two, the Indians.

PRESIDING JUDGE: Do we have those cases cited?

MR. WRIGHT: Those cases are cited and referred to in the stipulation of facts.

PRESIDING JUDGE: All right.

MR. WRIGHT: Copies of both opinions are attachments to the stipulation of facts.

[5027] Along with the riparian flumes, what overlying water uses? For example, there are presently farming operations of a limited nature being conducted upon these lands which derive their water from the underground. Can water be used also for domestic purposes, for recreational uses conducted on the property which has so been included, if it is in fact, as a part of Project 176.

Then the effect of the permit given by the Department of Agriculture, U. S. Forest Service, for the existing spillway which has not ever been used although it is constructed. A portion of it lies upon Forest Service land, and the testimony of Mr. Collins is that it would be abandoned. If the redesign of Henshaw Dam is carried to fruition, that redesign contemplated a new much larger spillway located on land owned in fact by the Irrigation District.

The minimum inundation which would result if the reservoir were reconstructed to a level of 50,000 acre-foot maximum capacity, which is still a wishful hope, should also be considered as to the effect of that Department of Agriculture permit. Can this condition now be included without any action of the Vista Irrigation District which is satisfied to rest upon the rights afforded in the permit given quite a few years ago.

Those in the main are the comments and questions with relation to Condition No. 1.

[5028] PRESIDING JUDGE: Let me add one to that while we are getting them all right together.

I join you in a great deal of mystification of what in the world is meant by including some private property in the project works for the project — that is what it says, project works. After all, I have seen the definitions and so on, but

going back to basic principles, what is here concerned is an issue of a license. And a license by its very word is a permission to do something.

Now, even if we assume that the government ints [sic] majesty may appropriately say it is quite all right for you, Mr. Vista, or you, Mr. Escondido, to put some water on that ground, I will confess I don't see what significance that has unless, as you say, we have the jurisdiction to control or to deny such permits. And merely giving somebody permission to do something, I don't see how anybody can be hurt by it; you see what I mean.

You say you have already got the right to put the water there, to let your dam sit there. You bought the ground years ago and got that right, as you see it, as I understand it. Now all that is proposed here is that — as far as I read on the very letter, that the government now come out to California and have a look at it and say all right, Mr. Vista, all right, Mr. Escondido, you may put water on your land, which you have been doing for fifty years, or [5029] a hundred years.

Now, whether we have got any jurisdiction to do so or not, I don't see how that is material, because I don't see how it makes any difference. If we say you can, so what? You are not any better off or worse off than you were before. If we don't have jurisdiction, I mean, we obviously haven't given you anything; neither have we taken anything away. So what I need from our distinguished brethren of the Department, with the I am sure interested advice from our Staff, what underlying, latent, lurking significance has this suggestion which the Staff has talked about heretofore? What is beneath this surface, you see what I mean.

Merely saying give somebody permission to do what he thinks he already has got the right to do doesn't obviously

on its face mean anything. You are saying you can do something. Well, he is already doing it. He says he can do it, so what.

But what is it, then, there must be something back that I don't perceive. What is it that is actually affected by putting it in the project? Who is hurt by it? Who is restricted? What is it somebody can't do that he could do today? See what I mean. How does it affect, A, Vista as the landowner; how does it affect Mutual as the present licensee; C, how does it affect Escondido and Vista assuming they were the new licensees. What does it give them or what does it take away from them, and how does it affect anybody [5030] else, is what I would like to have some exposition on. I don't understand what it means, frankly.

Now, what about No. 2, Mr. Wright?

MR. WRIGHT: No. 2 generally is a requirement that Vista Irrigation District agree to be subject to the terms and conditions of the license subject to the jurisdiction and control of the Federal Power Commission and the Department of Interior, with respect to the terms and conditions of the license and to Vista's use, occupancy and enjoyment of the lands of the La Jolla, Rincon and San Pasqual Indian Reservations in connection with Project No. 176 operations.

Inferentially I might also raise a question at that point whether or not that portion of Condition 2 is meant and designed to refer to the Condition No. 1 and the two read in conjunction so that in effect the Federal Power Commission and the Department of Interior would, through the guise of the license, have jurisdiction to control the operation of Henshaw Dam, the production of storage behind that dam of natural flow, the releases from that dam, and the nature and extent of the ground water pumping from the lands owned by the District.

So my first question there is, is No. 2 to stand on its own feet, or is it to be construed in conjunction with Condition 1?

PRESIDING JUDGE: I didn't think there was any doubt [5031] about that. Isn't it obvious, Mr. Ranquist, in your judgment, all of the conditions are put in here cumulatively?

MR. RANQUIST: Yes, sir, they are cumulative.

That is not to say, though, that we might not change one without changing the other.

PRESIDING JUDGE: Yes, I understand. But when I read 2 I understood when it said "the license," I thought they meant the license for the area including Henshaw as said in 1. Obviously, I am sure that is what they mean. But you are free to ask it to be clarified if you want it.

MR. WRIGHT: Continuing, Vista Irrigation District further agrees to pay annual charges pursuant to 10(e) in an amount fixed by the Commission for Vista's use, occupancy and enjoyment of the Indian land involved in 176.

Apart from the first question as to what the scope of the project facilities is referred to, the next question, again, what jurisdiction is conferred upon the Department of Interior to supervise the operation of the project in conjunction with and in cooperation with or in *pari materia* with the Federal Power Commission. The Federal Power Commission is given the right under the statute to issue the license. It under its statutory procedures, and taking the criteria which the statute sets forth and under its rules and regulations, is supposed to regulate the operations of any licensee. Here all of a sudden it is hooked up in tandem with the Secretary of Interior. Is the Secretary of [5032] Interior to exercise its functions under the rules of the Federal Power Commission, or is the Secretary to be free to exercise his own whim as far as the operations of the licensee. If not,

he is not free to exercise his own whim, and caprice, what are the restrictions on his power?

PRESIDING JUDGE: All right, now I don't want that, Mr. Wright. I don't think that is a fair and proper way to talk to the Secretary of the Interior. He is quite subject to the due process clause of the Fifth Amendment as much as any other official. And I think it is quite beyond the bounds of propriety to suggest that he is going to act in the terms of whim and caprice.

MR. WRIGHT: The admonition is fully deserved. I accept it.

PRESIDENT JUDGE: I know that you don't want them to and nobody expects them to, and I have no reason to expect that they would not be willing to listen to reason and that when they do act they would act in the way that they think is rational and proper. Whether we agree with them or whether you agree with them that is something else again, but I don't believe we should be the vehicle for presupposing that they are going to act by whim and caprice and spoil Mr. Ranquist's afternoon.

MR. WRIGHT: I apologize, your Honor. The comment is well deserved and I would withdraw those statements.

[5033] But I would point out the reason for my inquiry.

PRESIDING JUDGE: Yes. It is a fair question.

MR. WRIGHT: What statutory controls — or guidelines —

PRESIDING JUDGE: Yes. On what legal basis does the Department of Interior here undertake to join in the control of the project.

MR. WRIGHT: Yes.

PRESIDING JUDGE: That is a fair question. And I think you could fairly ask by what — what was your term there, by what guidelines does Interior propose to act? Will

it be solely in the interest of the Indians, for example? Or will it also be in the interests of our environmental law, for example? Will it also be in the interests of the statutes that underlie our soil conservation program? Will it also be in the interests of the objectives of the Bureau of Reclamation, for example? Would it also be in the interest of the national need for power? Will its objectives also consider fairly and equitably the rights of all of our citizens, not merely the Indians; that is, including even the City of Escondido, who I suppose are taxpayers as much as anybody else, and Vista, of course, and Mutual. In other words, will Interior's approach be that of part of our national government.

As President Cleveland said he is President of all the people. And will Interior remember that, or will Interior be [5034] acting solely as the advocate and protector of the Indian Bands. If that is the sort of thing you are driving at, I join with you.

MR. WRIGHT: Yes.

PRESIDING JUDGE: I certainly join with you, yes.

MR. WRIGHT: The next portion of 2 concerns the payment of annual charges. I would ask whether or not the charges set forth to which reference is made in Paragraph 2 would be separate charges on Vista over and above those which would be expected from Escondido Mutual, or the City if it takes over.

I might point out here, your Honor, that there is before this court as one of the attachments to the exhibit the 1922 contract of November 1922 between San Diego County Water Company and Escondido Mutual Water Company in which for payment of certain annual charges and sharing of certain expenses Vista's water is wheeled, I believe the term was used today, from the intake of the Escondido canal through the project works and back to Vista at the outlet of

the — at the tailrace of the Bear Valley power plant. It is Vista's position, has been and would be, that any additional charges which are exacted of Vista by a third party, here being the Federal Power Commission if Vista became a joint licensee, or Interior — any of those charges would in turn by Vista be billed to and Vista would expect collection of or offset [5035] of those charges as against Escondido, resulting in a dual charge to Escondido if duplicate charges were exacted.

So my question is does this contemplate duplicate charges or one single charge.

Turning to No. 3, Mutual and Vista agree they shall not infringe upon or interfere in any manner with the right of the Indian reservations to divert the following annual quantities of water. Those quantities are exacted from Mr. Stetson's testimony, I believe, and are the quantities which are schematically shown in his Exhibit B-49. And they are explained in his testimony, B-40, and shown schematically in B-49.

Here it should be pointed out that Interior is asking as a condition to the license the complete capitulation by Mutual and Vista on the basic water rights claims on the waters of the San Luis Rey River. These claims and the validity of contracts which Vista and Escondido rely upon to limit those claims are in litigation now with the United States District Court for the Southern District of California before Judge Schwartz.

Further, the Federal Power Act itself declares that the Federal Power Commission shall have no jurisdiction to determine as between competing claimants questions of water rights. This condition would require that the Commission do just that; and as a condition to the grant of license [5036] exact a capitulation on the part of the adverse claimants to

the rights to defined by the Indians and Interior.

PRESIDING JUDGE: It would be helpful if somebody would remind me what is the average annual flow out of Henshaw now?

MR. WRIGHT: A little over 13,000 acre-feet.

PRESIDING JUDGE: That was my recollection.

Can we add one question, then, to that, to your questions under No. 3.

I added up the numbers shown there on page 3 under the annual average and they come to 34,480. And it is quite unclear to me how we are supposed to get 34,480 acre-feet out of 13,000 acre-feet. Perhaps that —

MR. WRIGHT: That, your Honor, you have to remember that the inflow into the river system does not stop in Lake Henshaw, contrary to what some people may have indicated.

There is continual inflow from tributaries arising below Henshaw Dam —

PRESIDING JUDGE: Yes.

MR. WRIGHT: — clear to the Pala Reservation, in substantial quantities.

PRESIDING JUDGE: That's right. But I would need it to be explained, then, what does this really contemplate? What it says is that the two companies are not to infringe upon the right of the reservations to divert the following [5037] quantities.

Now, except for a little bit of Pala, all the reservations are below the diversion dam.

MR. WRIGHT: That is correct, your Honor.

PRESIDING JUDGE: And I don't quite perceive what this amounts to. What could Mutual or Vista do to carry this out since the diverting is all down below? Now if what

this means is that we must make sure that we put a certain amount of water in the main stream at all times so there will be this much water to be diverted or something, why — in other words, I think it needs clarification. What is it you really — does Interior really want Mutual and Escondido to do?

MR. WRIGHT: Stop diverting, your Honor, any quantity. I think that is implicit from —

PRESIDING JUDGE: It doesn't say here.

MR. WRIGHT: I know it doesn't. And this is the problem.

PRESIDING JUDGE: As far as I can see, all you folks could do is sit there on the diversion dam and go fishing or something and the people say you are free down below to divert all the water they want to.

MR. WRIGHT: Yes, sir.

PRESIDING JUDGE: And you would be the last ones to want to stop them.

Now, if what they really mean is let a certain amount go by the diversion dam, well of course that has a real point [5038] to it.

MR. RANQUIST: Or release from the canal.

PRESIDING JUDGE: Something, yes. What is it that 3 really asks these people to do? That is the doubt that I have about this.

All right. What's next?

MR. WRIGHT: Well, also touching on 3, is Interior by this and all of these conditions which touch upon water quantities asking for — is what it is really doing is dishonoring contracts which Interior itself entered into on behalf of the United States and the Indians. Are they by this method repudiating those contracts?

PRESIDING JUDGE: Oh. Hold the phone. LEt [sic] me think a minute.

All right. I see what is going on. Okay.

MR. WRIGHT: One of the quantities, for Rincon in the Condition 3, 11,140 acre-feet per annum on a 25-year average, with a maximum annual diversion of 16,590, if it rained every minute of every day of every year so as to provide a continuous flow for 24 hours of 6 cubic feet per second, they would not approach those quantities for Rincon. The first 6 cubic feet of natural flow.

Condition 4. This refers to the Mission reserve. That is the large tract of land to the northwest of Exhibit M-68 which has been withdrawn but has not yet been created either [5039] by executive order or act of Congress into a reservation. I so understand it. If I am in error, I invite correction.

MR. PELCYGER: The lands have been withdrawn for Indian purposes. They have not been added to the Pala and Pauma Reservations, but they are a reservation; they have been withdrawn.

MR. WRIGHT: They haven't been declared a reservation by executive order or act of Congress.

MR. PELCYGER: They have been withdrawn by order of the Secretary of Interior as the Chemehuevi Reservation was.

MR. WRIGHT: They are awaiting reservation order, but there has been no executive order of the President or act of Congress.

MR. PELCYGER: That's correct.

MR. WRIGHT: Yes. Under what theory does the Secretary of Interior now reserve additional water, because the quantities of water in Condition 3 are expressly stated to be not including Mission Indian reserve lands.

It is our understanding that United States versus Winters and Arizona against California recognizes the intervening private rights existing as of the date of the establishment of the reservation by executive order or act of Congress. And I would also point and direct attention to compare in that connection Exhibits B-91, 92 and 93 wehre [sic] the federal court in [5040] the Santa Margarita case confirmed — rather with the approval of the Ninth Circuit — I don't recall at this point it being touched upon by the Ninth Circuit, but in the interlocutory decrees in that case and in the final decrees, the cut-off date as against intervening private rights was the date on which the reservations or the several portions of them had been established. So I ask again: Under what theory and as to what quantity of water does the Secretary of Interior propose to reserve this right to impose future and additional conditions.

PRESIDING JUDGE: Do you recall offhand, Mr. Wright, is the Mission reserve area that they are talking about in the San Luis Rey watershed?

MR. WRIGHT: No, sir, you would have to have a hydrologist or someone experienced examine the map. I know a portion of that lies in the upper reaches of Agua Tibia. The Agua Tibia area flows into the — or feeds the San Luis Rey northeast of Pala.

PRESIDING JUDGE: All right. But I think that would be an interesting point to have mentioned as part of the proposition: Is this merely another possible reserve located in the watershed and which would in the course of nature without Henshaw have some time participated in the watershed, or is this an area beyond the watershed [sic] that would have had nothing to do with it except for this.

[5041] MR. WRIGHT: I don't know where it lies.

PRESIDING JUDGE: All right.

MR. WRIGHT: Condition 5 relates to pumped water from the ground water basin above Henshaw —

MR. PELCYGER: Excuse me, Mr. Wright.

MR. WRIGHT: Yes.

MR. PELCYGER: Your Honor, the answer to that question I believe should be capable of being determined from Exhibit I-41, which does show boundaries of the watershed. Unfortunately, it does not show the Mission reserve. But I think when you juxtapose the Mission Reserve next to the Pala Reservation you will see that virtually all of it is within the watershed.

PRESIDING JUDGE: Thank you. That is helpful. I will read it while we are hearing about the next item. Go ahead.

MR. WRIGHT: Condition 5 relates to the ground water pumped from the aquifer underlying the Warner Ranch. And simply stated, it says none of that water shall be transported through Project 176 facilities. And I take it here they are speaking — the Secretary is speaking only of the Project 176 facilities as they now exist. They will not be transported through those facilities without prior written consent of the several bands and the approval of the Secretary of Interior.

I raise the question is not this in conflict with [5042] Condition 1 and perhaps Condition 2? Because under Condition 1 these lands were a part of the project, expanded, subject to the control of the Power Commission. Condition 2 as to operations, there was an expressed assertion along with the Power Commission's jurisdiction of the Secretary of Interior.

And now here for a part of these conditions we have additionally the jurisdiction of several of the Indian Bands.

And which of those bands? Not only do we have Rincon, who would be most directly concerned because of the contractual provisions of the June 1922 contract between Hen-

shaw and the United States, but we have Pala which this contract specifies are located so far downstream that it is anticipated by the parties that the operations of Henshaw Dam and the construction would not affect Pala.

We also have Pauma and San Pasqual who now are given the right, if this be a condition, to determine when they would acquiesce in use of the conduit for the transportation of pumped water which if we literally interpret Condition 3 would not even be available to be transported in any event.

MR. PELCYGER: Condition 5, you mean.

MR. WRIGHT: Five.

PRESIDING JUDGE: Five, you mean; not three.

MR. WRIGHT: No, three is the total quantities which can only be generated through reliance on the ground water.

[5043] PRESIDING JUDGE: Yes.

All right.

MR. WRIGHT: They are saying in effect we can dump them downstream but we can't transport them through the canal.

PRESIDING JUDGE: I see. All right.

MR. WRIGHT: Then I have the question would not this condition be satisfied by recognition of the Powell Formula — and I will use those words for purposes of describing the procedure and the testimony which Mr. Powell has filed written evidence on which Mr. Stetson and Mr. Kunkel both agree would afford a reasonable basis for reconstruction on an annual basis of the natural flow which could exist in the river had Henshaw Dam not been built under present conditions and including pumping. Would not the purpose of Condition 5 be satisfied so as to reconstruct the natural flow of the river, the first 6 second-feet, through the utilization of that approach.

MR. PELCYGER: Excuse me, Mr. Wright. You are referring to that part of Mr. Powell's formula that applies to the natural flow above Henshaw.

MR. WRIGHT: Yes. And that is the only portion of the natural flow which, as I understand the record, is affected by the pumping above Henshaw.

MR. PELCYGER: That is why I asked the question.

MR. WRIGHT: Condition 6 I would like to skip for a [5044] moment, if I might, because it deserves more comment than all the others.

[5045] Turning to Condition 7, this relates, if I may paraphrase it and briefly, to the so-called pumping by Vista for the benefit of Pala and the argument not that that pumping occurred but rather where shall it be permitted. I would point out that that is a contractual dispute, one which does not involve Escondido; it is solely between the United States, Pala, and Vista, and is the subject of litigation now before the United States District Court as to a fair and proper interpretation of the contractual rights.

I would question, then, why is it made the subject of a condition again that Vista capitulate as to its intended construction as a condition to being able to obtain the benefits of the project.

Condition 8 relates to the undergrounding of the canal, the conduit, through the area of the San Pasqual Indian Reservation. Mr. Engstrand has indicated in the first day of the proceedings in Escondido that this was an acceptable condition.

If Vista is required to be a licensee with Escondido to the present project facilities, it would concur. The only question I have is the time. The Condition 8 suggests within two years from the date the license is granted. Both of us feel — both Vista and Escondido feel that this additional

work is desirable, would free portions of the Indian reservation from the burden of the license, and [5046] should be undertaken at the earliest possible date. But we raise the question of the time in the light of financial priorities and commitments that all of us have.

PRESIDING JUDGE: Could I add one or two post-scripts to that on No. 8.

A, Mr. Engstrand told us the other day that Escondido and Mutual will not take or abide or accept any of these conditions. You now indicate that there might be a way to accept No. 8. Do you join in that, Mr. Engstrand?

MR. ENGSTRAND: Yes, Your Honor.

PRESIDING JUDGE: All right.

My second one is I wonder, Mr. Wright, if you have any trouble about the mechanics of this thing where it says written approval of the San Pasqual Band. Now, I am not clear how that sort of thing takes place or how it is evidenced, and I would hesitate, if I were a lawyer for somebody dealing with the band — I would hesitate very much to have an obligation like that until I can find out how does that approval of the band become manifested and how does it become settled. See, in the case of a corporation I get a resolution of the board of directors and I think I have got it. But I don't understand how I would get from the band something that would bind the band for years to come.

MR. WRIGHT: All right.

MR. GAJARSA: Your Honor, that would be — may I [5047] answer that question, Mr. Wright?

The San Pasqual Band is organized under the Indian Reorganization Act, Section 16. They have a business committee, by-laws, and a constitution, under which they operate their government. And the business committee in essence operates as a board of directors. A resolution from

them would have to be obtained in writing at a general council meeting.

PRESIDING JUDGE: And what would be the basis of authority of that committee to make this approval on behalf of the band? Where would they get the authority?

MR. GAJARSA: The authority is from their constitution and from the general council. The general council consists of all the voting members of the reservation.

PRESIDING JUDGE: Oh. That council is C, O, U, N, C, I, L.

MR. GAJARSA: C, I, L.

PRESIDING JUDGE: All right, all right. Maybe there isn't any problem there.

MR. WRIGHT: I have one other comment, Your Honor, on Condition 8, insofar as the written approval of the San Pasqual Band is concerned and the Secretary of Interior. I raise the question of the jurisdiction of the Indian bands and Interior to — Interior can impose that condition, but I raise the question which was decided for the Commission, at least, in Northern States Power, that the [5048] Commission has the right, as against a veto asserted by the bands, to grant the license or rights of way for license purposes. So I raise the question what is the basis for requirement of the written approval.

PRESIDING JUDGE: All right.

MR. WRIGHT: Condition 9 relates to right of way uses. Here again I may speak, I think, for Escondido and Vista as prospective co-licensees of the project facilities as those facilities now exist. And this relates to the rights of way and the right of the Indians to utilize portions of their reservations not physically occupied by project facilities. A reasonable width, reasonable for the purposes being now defined, would be required, and the general nature of per-

mitting the bands the maximum use of their reservation lands is acceptable — would be acceptable. I think, however, additional language should be added, and if the parties will follow me I think for the moment I can with a few words indicate where. There is in the seventh line the words "Provided, however," "Provided" in initial caps. The previous sentence, "... across Indian lands shall not preclude agricultural or other use by the Bands of the land included within the right of way that is not actually utilized for the facility itself.

"Provided, however, that the Bands shall not erect permanent structures" — and at that point I would add "or make such other uses of their lands" — continuing on — "which [5049] would interfere with or obstruct the licensee's access."

PRESIDING JUDGE: Would you take the word "non-agricultural" in front of the word "other uses"? Or make it "other non-agricultural uses"?

MR. WRIGHT: Not including agricultural?

PRESIDING JUDGE: Non-agricultural. What you want is to keep them from building fences, buildings, structures, factories, homes, things that would make it impossible to get to the ditch.

MR. WRIGHT: Or even construct — plant trees.

PRESIDING JUDGE: Well, I don't see where they can't plant a tree.

MR. WRIGHT: One tree, no, that is proper. But if you get an orchard which is planted close together so you can't get trucks through there you are creating an obstruction.

PRESIDING JUDGE: Well, all right. I see your problem.

MR. WRIGHT: That is the purpose and intent of trying to work and —

PRESIDING JUDGE: This sort of thing can be worked out. I think everybody is in agreement, and I think everybody is inclined to be reasonable. And they recognize that you obviously can't run the ditch without getting to it and taking care of it. And I think you are being very fair in recognizing that that doesn't mean that all the land down there has to lie fallow just because of that.

[5050] MR. WRIGHT: No.

PRESIDING JUDGE: And sensible people can certainly work that out and I know they will be glad to consider your thought.

MR. PELCYGER: Would Mutual and Vista think that hunting is an obstruction?

PRESIDING JUDGE: What's that?

MR. PELCYGER: It was in jest, Your Honor.

PRESIDING JUDGE: All right.

MR. WRIGHT: Before touching on Section 10 I should like now to turn to Condition 6, which I choose to identify as somewhat of a shotgun. It is broken into many, many parts, although it is treated as one condition.

In the first instance, Escondido and Vista are required to agree that La Jolla, Rincon and San Pasqual have at all times the right to take water from the conduit for agricultural, domestic, recreational, or other purposes including the recharge of the Rincon portion of the Pauma Basin; that Escondido and Vista will provide water for those purposes at such times and in amounts as shall be specified by the Secretary of Interior on an annual basis; that Escondido and Vista shall be required to release water at the intake and/or the Rincon penstock to recharge the Pauma Basin and/or the Pala Basin at such times and in amounts as specified on an annual basis by the Secretary.

[5051] Fourth, that Escondido and Vista will provide water sufficient for the first, agricultural uses and recharge from all sources, including storage in Lake Henshaw, so that the Indians are not limited to the natural flow.

At last, the quantities specified in Condition No. 3 — that is the rights on an annual basis which total some many thousands of acre-feet — shall not be exceeded except when in the opinion of the Secretary larger quantities are needed for recharge. Here again we have the question of the jurisdiction, the basis for, the limitations upon, and the rights in tandem with the Commission's of the Secretary of Interior and also, in some instances, the Indian bands.

First, and not following the same order in which the points are stated in Condition 6, we have the situation of Pala, because one of the items here is to recharge the basin of Pala at such times and in amounts as specified by the Secretary of Interior. Pala doesn't relate to Project 176.

PRESIDING JUDGE: Do you think I better send some rent money for the use of their house for the hearing? We had a very pleasant hearing up at Pala, as I remember.

MR. WRIGHT: The question of Pala is involved in a contractual dispute between Vista and the Department of Interior and the Pala Indians. Escondido is not involved in that. Here Escondido is being asked to recharge for their [5052] benefit.

As a matter of fact, as I understand the record — at least it is the contention of Escondido that as to their right which can be identified as their appropriative right on the natural flow, their so-called A water which was firmed up they claim in 1894 — that right enjoys a priority to Pala except to the extent of some approximately — some area approximating 160 acres.

MR. PELCYGER: Does that contention include any rights that Pala might have by virtue of its riparian status just under state law, without regard to any Winters claim?

MR. WRIGHT: Appropriation would be predicated upon the existence of a surplus and a prior appropriation of the surplus at a prior time, I believe.

MR. PELCYGER: But the appropriative right is not superior to — an appropriative right is not superior under California law to a downstream riparian right? Unless —

MR. WRIGHT: This points up — rather than argue it here now —

MR. PELCYGER: Yes.

MR. WRIGHT: This point [sic] up the issue that is raised by Condition 6 as far as the Escondido Mutual is involved. As far as Vista is concerned with respect to Pala, Vista contends we have a contract in which the United [5053] States on behalf of the Pala Indians agreed to — or consented to the construction of Henshaw Dam and the diversion of all waters derived therefrom out of the river on condition that Vista comply with No. 6. The issue there, as I have indicated many times, is Vista is willing to comply; the question relates to the place of performance, which is in litigation.

MR. PELCYGER: Excuse me. I —

MR. WRIGHT: And we therefore ask how is this a proper subject for a condition.

PRESIDING JUDGE: All right. That is a fair question.

Could I add one or two points to No. 6, if that finishes your point about No. 6.

MR. WRIGHT: No, sir. I have a couple of pages on 6.

PRESIDING JUDGE: Well, does that mean that will end this proceeding? I am a little anxious to get on.

MR. WRIGHT: So am I.

PRESIDING JUDGE: All right.

MR. WRIGHT: Second, we have the question of recharge. 6 speaks of two recharges: number one, the Rincon portion of the Pauma Basin, and number two, the Pauma and Pala Basins in their entirety.

Next — I would like to know — the question is what does it refer to? Are we called upon to recharge the Pauma and Pala Basins to the benefit of non-Indians under the guise [5054] of firming up the prior rights of the Indians and the non-Indians who thereby benefit have conveyed their rights to Vista as far as the Henshaw water is concerned or lost their rights to Escondido by prescription or prior appropriation.

Next, as to the source of the water, No. 6 says it shall be met from storage — no, the exact words: Escondido and Vista must agree that they will provide such water from any and all sources, including storage in Lake Henshaw. Does this mean that both of these parties as prospective licensees must commit imported water or only water in storage? If it is water in storage does that not amount to an appropriation in contravention of the Constitutional right to fair compensation since the storage facilities, the lands, the very things that have made that storage are constructed on private property by private capital and this would require their devotion to another use.

Secondly, is not this condition an extension upon the doctrine of Winters in that as defined in Winters and elsewhere, including the Santa Margarita, to use the words of the court in its findings of fact and final judgment in Santa Margarita, the right of the reservation is limited to so much of the water which under natural conditions would have been physically available on the reservation lands.

We also question what is meant by recreational or other [5055] purposes upon the reservation as far as the use of water.

Those in the main are the questions relating to No. 6.

PRESIDING JUDGE: May I add one or two small addenda on No. 6.

I at least, as an outsider to this thing, don't pretend fully to understand it, but between No. 3 and No. 6 my impression is that a very substantial part of the water that comes down to the diversion dam and/or would now go through the conduit will not go to Lake Wohlford, would not go to the new licensee. I can't from reading this have any estimation of the amount, whether this condition of Interior contemplates taking 10 percent of the water or does it contemplate taking 99 percent of the water. I can't possibly from reading this figure it out.

If it be assumed, and if we are advised by the Department that obviously this does contemplate taking a substantial part, say a fourth or a third or more of the water in the river, or more, then I would inquire whether the Interior has examined the financial reports and has considered that it costs money to operate Henshaw and the conduit and does the Interior's condition contemplate that Interior would share in the operating costs such as pro rata according to the way the water is shared, or what does Interior contemplate about who is doing [sic] to pay the bill for getting all this water to where Interior wants it?

[5056] Anything else about No. 6?

MR. WRIGHT: Well, 6 together with 3, if I may state, our reaction has been that there would thereby be appropriated, if I may use that word in quotes and advisedly, by the bands under the guise of these conditions, practically the entire net quantity of water that would be provided by

the project as now operated. So that this is the reason which caused Mr. Engstrand to remark and me to echo the other day that with these conditions under no circumstances would we accept the license.

PRESIDING JUDGE: All right.

MR. WRIGHT: Condition No. 10 I think is a general catch-all. My comments I have already alluded to, they would be equally applicable here, relating as they do to supervision by others, namely the bands and Interior. Are the bands—supervision of the bands to be had with individuals, with tribal spokesmen? Are they to be evidenced in every case by action of the band's council, C, I, L, or are our relations to be with Interior and Interior only? What role has each of these entities to play. Because 10 says that no use shall be made of any of the reservation lands which has not received the prior written approval of the affected band, the Interior Department, and the Federal Power Commission. We believe this and our first reaction to be a condition at variance with Section 10 of the Federal Power [5057] Act which generally vests in the Commission supervision over the operations of its licensees.

PRESIDING JUDGE: So all that 10 really does is to add the affected band and the Interior to the supervision that the law now requires of the Power Commission.

MR. WRIGHT: That is correct.

PRESIDING JUDGE: Yes.

All right. Well, that is a very learned job. You gentlemen have certainly made it very clear, I think, what your problems are. And I think it will be very helpful to us, at least, if the Interior Department finds itself moved to come down from its Olympian height and explain to us what are the answers to these various questions.

I have no right to command it, of course. If they wish to come we shall appreciate it very much, and I am sure the record will be benefited. And we would hope that Interior might find some small benefit from the interchanges that doubtless would result.

I would like to assure you, Mr. Ranquist, that your man would not have to come fearfully anticipating withering cross examination. He could come, I hope, in the spirit of cooperation that he will be received with. And will be glad to hear his thoughts in answer to these various questions, and we would be glad if he would consider the thoughts of the persons here in the room that might be [5058] expressed to him. But I assure you they would not be put in the form and the tone and the manner of some of the withering cross examination that we have had in this rigorous proceeding.

Does the Staff have a similar group of questions that you feel you want to put now, or do you want to put them later?

MR. WOODS: Your Honor, I have a few here. I listened with interest to Mr. Wright's questions and his seeking advice from the Department of Interior. I generally agree with the questions, not specifically on all points, of course.

I don't have as many questions, primarily because I didn't think that a witness could come here and speak on the legal matters which I think many of these questions detail themselves to.

PRESIDING JUDGE: Why not?

MR. WOODS: Well, unless they bring an attorney over here.

PRESIDING JUDGE: They have sure been arguing a lot of law here the last month.

MR. WOODS: Yes, sir. If one comes, certainly he could subject himself to questions on all ten, yes, sir.

PRESIDING JUDGE: Not subject himself to questions, but present himself for the opportunity of receiving the learned suggestions of his cohorts in the law.

MR. WOODS: Yes, sir.

PRESIDING JUDGE: And discussing these things on a [5059] purely academic basis, perhaps.

MR. WOODS: We would anticipate him coming in good spirits, yes, sir.

PRESIDING JUDGE: Of course.

MR. WOODS: We would receive him in good spirits.

Your Honor —

MR. RANQUIST: Just one question on that, Your Honor. I would like to get it straight so that I understand what you have in mind. You are considering a witness an attorney here from Interior here to discuss from the witness stand the legal issues raised?

PRESIDING JUDGE: If the Department wishes to send him, and insofar as these questions do go into law. Like the first one, he said the jurisdiction. What in the world, the first thing he pointed out was you want to put Henshaw in this license, and what is the jurisdiction to bring in a large privately owned lake and dam into a Federal license. Now, I don't know how that can be discussed except from a legal standpoint.

MR. RANQUIST: I agree. And we had anticipated that that type of thing would be discussed by legal briefing.

PRESIDING JUDGE: Well, if you prefer. All of this is purely up to you as a matter of preference. If you would like to come and help us understand your viewpoint in suggesting what you are suggesting, why, we would be glad to hear it.

[5060] MR. RANQUIST: Yes, sir, we would be glad to assist in bringing anybody here who can add to any

explanation of the position taken by the Department of Interior.

PRESIDING JUDGE: Yes. Obviously in this sort of thing we are not in a hearing in the sense of a trial, so on. It is a conference, is what it amounts to. It is a conference among the parties here and between us for the Commission and the Interior people to try to get a common ground for these problems. And I don't see any particular relevance to whether it is a legal question or it isn't. If it is an important question and it is worth discussing, perhaps your legal eagles would be glad to hear the basis for the doubts suggested by Mr. Wright, by Mr. Engstrand and Mr. Duncan and Mr. Lincoln.

MR. RANQUIST: We will be glad to do this at least: we will take the record and we will copy it and from it we will decide what we can bring — they will decide what they want to send over here and what will appear.

PRESIDING JUDGE: All right.

MR. WOODS: Of course, Your Honor, Interior understands that all of these conditions must be dealt with, sooner or later we are going to have to deal with these conditions. Now if they can get a man over here who has the policy behind him or the ability to speak for policy and the legal aspects of it, then all the better.

[5061] MR. RANQUIST: That is my difficulty, but we will certainly take under consideration and under advisement everything that has been said.

PRESIDING JUDGE: All right.

MR. WOODS: Your Honor, if I may hurriedly proceed.

With respect to Condition No. 4, I would ask the question how does the Secretary of Interior reserve any rights to impose conditions on a license operation when those conditions must be contained in any new license issued by the

Power Commission. In other words, the license must contain conditions and new conditions countered by Interior subsequently must be through the FPC, you see. We issue a license which contains conditions. Then the way I read Condition No. 4, they have the right to come up after a license is issued and say wait a minute, we are going to issue — we want four or five new conditions in here, you know, 30 days later, 60 days later or 10 years later. I say procedurally you can't do that. I don't believe you can. There is a procedural way to handle it and we want to know what you have in mind.

I think that is our prerogative, you see.

I say our, meaning the Federal Power Commission. Not personally myself.

MR. RANQUIST: A point to be discussed.

MR. WOODS: Condition No. 6, I believe Mr. Wright went [5062] over that better than I had anticipated. I was amazed at the amount of water that No. 6 would give to the Indians in relation to No. 3, you see. No. 3 is Mr. Stetson's testimony, as he well said, to 20,000 acre-feet per year.

PRESIDING JUDGE: But do you have information that would tell me how much 6 and 3 would leave for the project?

MR. WOODS: No, sir, I don't. That is my point. It is wide open. It is — what do they call them? A non-contained, open-end condition, you might say. Open-end. I don't know where they would get the water to do it if they could.

With respect to Condition No. 9, we would like to have a witness explain the proviso which holds harmless certain parties for certain acts.

Now, if you will look at Condition 9 hurriedly, I don't understand your language here; maybe it is just me.

PRESIDING JUDGE: Look, that is the one that the parties are almost in agreement on. Let's don't upset the apple cart.

MR. WOODS: Let's go on down to the last proviso, Your Honor, and I will quote it. Quote: And further provided that the licensee agrees to hold harmless the band, and band members, or their agents, employees, or assigns for any damages to agricultural crops or other damages which may be caused by the maintenance or repair of project facilities on Indian lands by the licensee. I don't understand who they are trying to hold harmless.

[5063] PRESIDING JUDGE: It is like an OL&T clause. Did you ever have an OL&T policy? That is all it amounts to.

MR. WOODS: I am sure they will be ready to answer.

PRESIDING JUDGE: They may have to get an insurance policy, but so what?

MR. WOODS: I thought it was harmless at first too when I first looked at it. But maybe I am a little dense. I don't understand exactly what they mean.

MR. PELCYGER: Could you specify your questions about it a little more clearly.

MR. WOODS: Just explain what you mean in legal terms. That is all I know to ask you.

Now, with respect to Condition No. 10, how does Interior arrive at the conclusion that it and the Indian bands have authority to approve the use of FPC-licensed project lands when only the FPC can sanction uses or changes in usage of project lands. In other words, I think you are usurping our jurisdiction here. There are procedures which you must go through the Commission for any of these changes, you see. In other words, I believe it is Section 4 or Section 9 — well, I am not sure what section of the Act just offhand,

shooting from the hip. But it says — wait a minute. It is Section 6. It says that licenses may be revoked only for the reasons and in the manner prescribed under the provisions of the Act and may be [5064] altered or surrendered — in other words, altered is what you are talking about — upon mutual agreement between the licensee and the Commission, you see. So you can't just come out, Interior, and say we are going to change the operation.

I think there is a recent case down on that, Your Honor. Arizona Public Service came down in late July which said you cannot change a license here that amounts to a contract unless you have mutual consent between the Commission and the parties.

MR. PELCYGER: Would you give us the citation on that case?

MR. WOODS: Yes, sir. Just a moment.

PRESIDING JUDGE: All right. Now, Mr. Ranquist, I want to reassure you again that this meeting will not be a hearing in today's sense. I think what we shall all do is sit around one table. It will be really a conference, in the effort that the folks here can be enlightened as to what your people really have in mind and something that they can be told of what is back of it and why. In other words, something to show the reason behind the rule, so to speak. And perhaps an opportunity also to show to your people what the problems are that beset the folks here, both the Staff and the licensee.

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Excerpts from Reporter's Transcript of December 4, 1973 (Colloquy of Counsel and ALJ With Interior Officials Re Exhibit I-78) [29 TR 6043 (line 16) - 6045 (line 9); 6046 (line 14) - 6047 (line 17); 6055 (line 6) - 6056 (line 8); 6057 (line 12) - 6059 (line 19); 6062 (line 8) - 6128 (line 8); 6131 (line 4) - 6182 (line 3)].

MR. RANQUIST: Your Honor, we have here present with us this morning Mr. Kent Frizzell, the Solicitor from the Department of Interior, Mr. Morris Thompson, the newly appointed Commissioner of the Bureau of Indian Affairs, and Mr. Reed Chambers, the Associate Solicitor for the Division of Indian Affairs, all from the Department of the Interior. They are here to meet with us at your Honor's request and at the request of the parties of the Escondido Mutual Water Company, the City of Escondido, and the Vista Irrigation District, and the Staff, to respond to any [6044*] questions that you have concerning Exhibit I-78, which are the conditions your Honor requested that the Department of the Interior would be asserting under the provisions of 4(e) of the Federal Power Act.

Now, gentlemen, we would like, if you would, to take seats up behind the bench where the Judge is located. He would like for you to sit up there.

(Witness Powell temporarily excused)

PRESIDING JUDGE: All right.

We are very glad to welcome you gentlemen. I am Bill Ellis.

(Discussion off the record)

*Numbers found within brackets refer to the page number of the original transcript.

PRESIDING JUDGE: This procedure is unusual obviously, but the point is that we want to emphasize that we are here in a conference approach rather than in the formalities of an adversary hearing.

We are all indebted to the Secretary and to the Department of Interior for their cooperation in the obviously big job that they undertook to write the letter which we have identified for convenience as I-78.

Our people here have all studied the document with great care and interest and appreciate this opportunity to meet with you for the purpose of discussing its implications, its background and its purpose, the idea being that each of us may have certain questions or suggestions that we would [6045] like to put before you and would like to discuss with you.

Now, the plan would be for a very informal conference type arrangement.

What I thought was we would take up each of the several conditions there mentioned with the point that the folks here would like to present any suggestions to you or questions and make them general. Whichever one of you wants to answer, very well, answer. If you don't want to answer, very well, And [sic] make any presentation that you are advised to do.

* * *

[6046] * * *

MR. RANQUIST: Your Honor, I have something that I would like to say on behalf of the officials from Interior.

PRESIDING JUDGE: All right.

MR. RANQUIST: They are that Mr. Thompson, as I mentioned yesterday, has been Commissioner of Indian Affairs for only about two days. Consequently, the opportunity for him becoming briefed with respect to this question has

been extremely limited. And he is here more to listen and to become educated, I believe, on what the issues are on the policy decisions he will have to make.

Mr. Kent Frizzell, the Solicitor, has not been briefed with respect to this subject except to a very minor degree. [6047] He is here again to listen and to participate to the extent that he desires, but he wants you to know that he has not been briefed, he does not know what the underlying facts or controversies between the parties may be.

Now, Mr. Chambers —

MR. FRIZZELL: I think that is what you call a disclaimer, your Honor.

MR. RANQUIST: Mr. Chambers has been the Associate Solicitor in the Division of Indian Affairs since August. He has been briefed with respect to this matter and is here ready to respond to the questions that will be propounded.

MR. CHAMBERS: I might say that Mr. Ranquist is an attorney with my staff, and I have reviewed his work on this case several times with him since I have been on board. So I am generally familiar with it, but I can't say that I know every acre or every drop of water of it.

* * *

[6055] * * *

MR. FRIZZELL: I don't know as this is going to be helpful. You will have to forgive me for lack of knowledge of descriptive terms and even the legal concepts involved. But if Point No. 1 from my limited knowledge of it — and I will have to admit, Your Honor, that if this Exhibit I-78 dated November 14, '73, is signed by Deputy Undersecretary Lyons, it no doubt contains my initials when it came through the Solicitor's Office.

MR. CHAMBERS: No, it didn't. It contained mine.

MR. FRIZZELL: Theoretically I should know all about it, but I frankly profess some ignorance to it. But if I understand Point 1, and that is that the government as one of these conditions, and I say the government, the Interior Department in this instance, is asking this Commission to include lands around Henshaw that are owned by these petitioners or whomever, I think that is an unreasonable condition in Interior's eyes.

PRESIDING JUDGE: I think they might corroborate your views.

MR. FRIZZELL: And you know sometimes when you are asked [6056] to appear here one side or the other they have to run the risks as well as the benefits. And on Point 1, I think Interior's position here is to listen and learn and try to be helpful to Your Honor and this Commission and be fair and equitable in our approach to it. And I want to do something to protect the Indian community and their interests here. But I think this is overreaching if we are asking that those lands around Henshaw be included as part of the project works.

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[6057] * * *

MR. FRIZZELL: What kind of conditions would be sought to be imposed on these lands surrounding Lake Henshaw?

PRESIDING JUDGE: That is a good question. I think Mr. Ranquist could probably tell us better than anybody.

You know, we have had this doubt of what in the world does this mean? I haven't got it straight through my head what you mean by saying they should become part of the license.

Now, after all, a license is a piece of paper issued by the Power Commission saying you folks, you licensees can do

something; you can go run a project.

MR. RANQUIST: Yes, sir.

PRESIDING JUDGE: Now, what business have we got and what is the net effect — the Solicitor wants to know what is the net effect of our writing that piece of paper and saying [6058] you can go do something on Henshaw?

MR. FRIZZELL: And I will tell you ahead of time, part of my question is — and I don't know what the terms of these conditions would be or what effect they would have, but just thinking off the top of my head here it seems to me if we seek to impose some conditions, I understand those are private lands, privately owned, no government title, interest in them as such. To me if I were these gentlemen the minute those conditions were attached I would be thinking of an inverse condemnation of some type and I think Uncle Sam would end up owing them some money.

PRESIDING JUDGE: You understand — excuse me just a minute, Harold. You understand it is not uncommon to issue —

MR. FRIZZELL: And I am not confessing judgment.

PRESIDING JUDGE: — a license on non-government lands where we talk about a dam across a navigable river.

MR. FRIZZELL: This is not a navigable river, is it?

PRESIDING JUDGE: Not exactly. You can walk it just fine.

We do issue licenses for land which isn't owned by the government in the sense that the dam goes across a navigable stream. And of course it may occupy some lands on either side. And then the license may say this includes 10 miles, is it, of transmission line out to the main line or something like that.

MR. WOODS: Yes, sir. The line necessary to go out to [6059] the main transmission system.

PRESIDING JUDGE: Yes. Now, as I understand it, it is a precedent for that sort of thing that the licensee has the legal title to the land, or a lease or an easement under the state law.

MR. WOODS: Usually a combination.

PRESIDING JUDGE: In other words, the Federal law contemplates that under the state laws the property will be obtained by the licensee. And that is one of the prerequisites, formally, I believe.

Now, here we are here because the project runs through Indian lands and the same law tells us to issue licenses for water power projects occupying Indian lands. And you see how part of it does — oh, what did we figure the other day? That roughly 40 percent of the conduit goes through Indian lands and about 50 percent government lands and 10 percent private roughly?

MR. RANQUIST: That is about right. They are public lands subject to the Department of Interior.

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[6062] * * *

PRESIDING JUDGE: As you can imagine.

It hasn't been worked out so far as I know, has it, Harold, that — as far as I know it hasn't been worked out what you would have to do to carry out Condition No. 1. Suppose they wanted to do it. Would they have to condemn all the land and pay for it, or would they —

MR. RANQUIST: No, sir. We would like to first of all explain for the Solicitor the factual background behind this.

MR. CHAMBERS: Maybe we could —

MR. RANQUIST: And talk to the three about the need to change —

MR. CHAMBERS: Maybe we could move it this way. I reviewed the letter which I had previously approved, after reading the transcript of Mr. Wright's comments on the letter which I understand represented the comments of all the gentlemen representing the private companies. And I initially raised the question of whether he wasn't right about the lands, the Warner Ranch or whatever those lands are [6063] called. And I discussed this with Mr. Ranquist, and then I discussed it with the Solicitor subsequently.

It seems to me that the concern that the Department has is that some things might go on on those lands which would affect either the quantity or the quality of the water supply along the San Luis Rey River, or other conditions would require water to be delivered to the Indian reservations.

I am basically in agreement with Mr. Wright, we hadn't focused on this before, that if you call these project works maybe they can't sell them or maybe they can't use them for certain things without Commission approval and it becomes cumbersome and burdensome and we don't need that kind of control over them to effectuate the concern that we have. So we are certainly prepared, as the Solicitor indicated, to work with the parties in drafting a condition there that excludes the lands from being project works but provides some protection for our concern about the quantity and quality of the water supply.

PRESIDING JUDGE: I think we could pass Section 1, then, and we will talk it over informally with Mr. Ranquist.

You are certainly right that the upstream conditions may affect below. In fact, as of now, the presence of the dam is a tremendous effect. Before, as I understand it — before the 1920's most all the water came down from December through March of [sic] April or so, and the summer months when [6064] water was wanted, but the dam comes along

to regulate. Now it took a lot of money to build it and I want to repeat my admiration for the enterprise that built the whole project, especially back in the nineties, when I don't imagine there was much power digging equipment. Just think of the job — very rocky soil. The job those fellows did must have been tremendous. I am told there was a lot of Indian labor employed on the project at the time, and it must have been a tremendous back-breaking job to do all that digging and they built the dam. But the effect of the dam is, of course, to make the water available more or less through the year, pretty well through the year.

MR. CHAMBERS: This is Lake Henshaw Dam?

PRESIDING JUDGE: Yes, the effect of that dam. And there is another effect. The big pumping program, quite a lot of — this wasn't found to be enough, you see. So they pumped out of the area around the dam, in that 40,000 acres he talks about, and that water flows on into the lake to add to the amount of water available. So there is a big effect on the area below by Henshaw. As of now it is a good effect. But there could also, I suppose, be bad effects.

MR. CHAMBERS: Your Honor, when we said that we wouldn't want to include the lands as part of the project work, that is not, of course, the whole condition. We would still want to include the dam and the lake itself as part of the project [6065] works. And they may have some problem with that. Or I understood they had some problem with that.

PRESIDING JUDGE: You see the practical point which Mr. Pelcyger has pointed out to me a number of times.

The lake, the dam and the water aren't much good to Escondido and Vista without the canal. The canal isn't much good to the bands without the water. And I really gather that the program is that if the canal is licensed to the bands instead of to the city, that there would be in contemplation

at least by some folks a mutual arrangement of benefit to both.

The bands have a tremendous agriculture program in mind but it is one of those long-range things. Their witness says it might be 20 or 30 or 40 years before it really comes fully to fruition. And in the meantime there might be a substantial trickle of water available to keep this lake going and perhaps to keep the water power project going. This Lake Wohlford is the subject of a big recreation program now. It is available for public fishing — not bathing, they assure me. They are not allowed to bathe there but they can go fishing and I think we pretty well argued them out of doing any hunting around there. But the fishing even includes catfish.

MR. CHAMBERS: Sounds like the Potomac, Your Honor.

PRESIDING JUDGE: Yes. It is a very pretty lake. We have gone all over it.

Well, why don't we pass Condition 1. I think it is [6066] something that we can work out here.

Do you want to say something about it, Mr. Wright?

MR. WRIGHT: There is one comment I would like to make on Mr. Chambers' last remark: that notwithstanding the excluding the Warner Ranch lands from the scope of the license, that Interior nonetheless would still seek by imposition of a condition including Henshaw Dam and the flooded area of the ranch within the scope of the license.

MR. CHAMBERS: That is correct. And we would also want to work with you —

MR. WRIGHT: Here again I raise the same issue as to the inclusion of private property in a project where it benefits others than the owner of those facilities.

PRESIDING JUDGE: The issue. You raise what issue?

MR. WRIGHT: The issue is one in effect of inverse condemnation.

PRESIDING JUDGE: Are you raising the issue of legality or of practicality or feasibility?

MR. WRIGHT: I am raising the issue in the alternative, because there are many conditions which could be imposed, such as the methodology of the computation of the reconstructed natural flow above Henshaw, such as the provision under contract of storage capacity behind Henshaw for the benefit of the immediate Indian tribes, La Jolla and Rincon, which could substitute for the necessary control. If Vista Irrigation [6067] District as owner of the dam were a co-licensee of the project itself to the extent that those facilities now exist, those contract provisions and conditions imposed on the operation upstream would be just as effective as if the license were extended geographically in scope to include the dam and Lake Henshaw, the flooded area of Lake Henshaw.

MR. CHAMBERS: Would you be willing to draft up a proposed set of conditions that would do that, Mr. Wright? I mean we would be certainly prepared to consider that.

MR. WRIGHT: We have approached that here in these hearings, and I think — yes would be the direct answer. I would be happy to.

MR. CHAMBERS: We would be happy to explore that with you.

Our concern is as we set forth in the letter, Your Honor. As we see it, in order to operate this project along the Escondido Canal they need to have the contract which I understand Escondido Mutual does have with Vista about releases from Lake Henshaw. So as we see it, it is really a comprehensive integrated development. True, it is provided contractually rather than by joint ownership of all the works,

but that in order to operate the facilities that are part of Project 176 efficiently they do need such a contract.

MR. WRIGHT: Let me point out one thing which has been [6068] alluded to but which ties into my comments here.

Lake Henshaw was originally planned as a surface storage reservoir which would impound and store surface flows which by the storage would be carried over from wet periods to dry periods. And I am not speaking of seasonal but wet years to dry years. With the drought conditions that came upon Southern California commencing in the first part of the 1950's — they even started a little bit in 1949 for their impact — it soon became apparent that the surface storage provided by Henshaw Dam was not sufficient. The earlier estimates of the net safe yield as a surface storage were predicated upon assumptions drawn from prior years which were not proven out within the time frame of experience. So that Vista as then the owner of the Warner Ranch, which I might say is one of the few remaining Spanish land grants — the title is derived back with a Spanish land grant and title was confirmed in the direct line of succession by the Treaty of Guadalupe Hidalgo with Mexico.

But with that ownership, Vista was able to tap the underground storage basin, not underlying the reservoir but upstream from it on the ranch, which is a very substantial ground water storage basin.

Recently we have had in California a very disastrous earthquake which generated a lot of inquiries into dams and other structures which could be affected by seismic [6069] movement. The California State Division of Safety of Dams has required an extensive review of all structures similar to Henshaw Dam, which is a design called a hydraulic fill. I won't go into the engineering on that, but suffice it to say

that it has been discovered as a result of this investigation which has been conducted since 1971 that Henshaw Dam sits athwart a rather possible active fault area and is subject to failure as a result of seismic motion. The State Division of Safety of Dams has withdrawn the permit to maintain the dam as it was constructed in 1928; has reduced the amount of permissible storage from 194,000 acre-feet, which never was utilized in the history of the dam, to 18,000 acre-feet, and has [sic] that permit expires in September of 1974.

Continual work is being done in planning and engineering, and the District has hopes that the State Division of Safety of Dams will approve a plan to reconstruct Henshaw Dam so that it will serve to impound a maximum of 50,000 acre-feet, a reduction from 194,000 down to 50,000.

Engineering studies have established in the opinion of the engineers, and hopefully they are right, that a dam of that size will suffice when operated in conjunction with the ground water basin. The reduced size of the dam would eliminate losses, tremendous losses by evaporation from the expanded surface storage, and would when the ground water basin is operated in conjunction with the dam itself, produce [6070] the best managed management of those water resources for the benefit of downstream users and those who have rights in the project and ownership of it.

MR. FRIZZELL: What has been the acre-feet storage over the last ten years average?

MR. WRIGHT: The highest since 1950 has gotten to 48,700 acre-feet.

PRESIDING JUDGE: Those are just peaks.

MR. WRIGHT: That is the highest peak. The low point was 137 acre-feet.

PRESIDING JUDGE: Usually it has been around eight or ten, fifteen thousand, hasn't it?

MR. WRIGHT: The average has been — the District has tried to hold the storage at a minimum of 2000 to 3000 acre-feet. That has not been kept by surface run-off because the run-off — the regimen has been — the natural flow has been destroyed as a regimen in the river because of the reliance on pumping and a good part of the natural flow serves to recharge the ground water basin. This permits the utilization of a lower surface storage capacity in Henshaw.

The cost of reconstruction of Henshaw Dam is not inconsiderable.

PRESIDING JUDGE: A million dollars?

MR. WRIGHT: Much more than that, Your Honor.

PRESIDING JUDGE: More than a million?

[6071] MR. WRIGHT: More than a million. And the present estimates, and they are merely estimates, are from a million and a half upwards.

PRESIDING JUDGE: There are two points of background that I should have mentioned that I didn't.

We don't write on a clean slate. The license issued here in 1924 for 50 years and it runs out next June. When it was issued, the Power Commission consisted of three secretaries. One was the Secretary of the Interior, the Secretary of War, and Agriculture. It wasn't until 1930 that it became an independent body sui juris and so on.

Secondly, the Escondido people went through tremendous efforts and contracts to get these water rights when they started this thing in the nineties, and again when it was increased, what, in 1914, and again in 1922. They are very long and complicated, and some of them are just impossible to figure out their meaning. But it isn't a case that they are here today asking us to give them the water. They claim the rights to the water under those contracts, and that right is being tried in San Diego.

MR. WRIGHT: To finish my background leading up to my comment, I personally can see very little, if any, difference between Henshaw Dam and the flooded area of water which would be inundated by the water surrounding it from the ground water basin. The whole thing is one privately owned facility. [6072] And to include any part of it from the standpoint of Vista Irrigation District would be the imposition of a condition which would give rise to inverse condemnation or other similar arguments on the part of the owner of that unless that inclusion was met and provided by a corresponding right that was acquired.

In other words, that area could be the subject of — those rights and those facilities could be the subject of a contract without the inclusion of any part of them in a license which would permit the —

PRESIDING JUDGE: Mr. Wright, I wonder if we are really being practical.

You are here asking this Commission to give you the right to use the Indian lands to carry the water. Is that right? At least Mr. Engstrand is here.

MR. WRIGHT: Yes, sir, We are offering to store their water.

PRESIDING JUDGE: All right, all right.

MR. WRIGHT: For them.

PRESIDING JUDGE: But stick to the point for a minute.

The point is as of now you folks at my left are here to get the right to use those lands to carry your water. Now, if that permission has attached to it certain conditions, namely Henshaw has got to be this, Henshaw has got to be that, the net effect may as a practical matter be the same [6073] thing whether we formally license Henshaw or not. If we say all right, you can't carry your water down those conduits unless you do thus and so up at Henshaw. And as a practical

matter, I don't — frankly, I don't see what practical difference it makes, whether you do that or whether we formally say Henshaw is part of the license. It is all the same result, isn't it?

MR. WRIGHT: Your Honor, I do feel in response to that last question that there is a difference in how the project might be operated in the sense of the places we would have to go to make other uses of our lands.

PRESIDING JUDGE: Yes. I know you got a problem there. And the number of government agencies you have to deal with is unlimited, it seems.

The last —

MR. WRIGHT: I don't voluntarily want to expand the scope of it.

[6074] PRESIDING JUDGE: I don't like it.

The last water case I had in California the folks were building a series of dams up north of here; they told me they had to deal with 27 state and federal agencies, in effect get the permission of all of them before they could get it done. And the fact is that the number of years it took to get those permissions was a lot more than it took to build the big Tri-Delta Dam up on the Stanislaus. It took a lot longer to get the papers signed than it did to build the dam. That is what Mr. Wright is talking about and I don't blame him.

Let's pass number one, then. I think we have done all we need to on that one.

MR. WOODS: Your Honor, may I ask the gentlemen a question?

PRESIDING JUDGE: Sure.

MR. WOODS: Gentlemen, I am Mr. Woods for the Staff. Bob Woods.

I think what you are saying in Number One is that you want to impose a condition upon the Commission to say that we must — I say we meaning the Commission — must license Henshaw, or include Henshaw and the Vista Irrigation District properties up there in a license.

Now, gentlemen, I am not sure that the Commission has the jurisdiction to do that.

[6075] You see, normally, when you license somebody, they come in and apply for a license. Now, Vista and Mr. Wright are being officially investigated here to see what their position [sic] is vis-a-vis the other parties under the Commission's order to so investigate them and we have combined that investigation as a part of this case.

MR. CHAMBERS: Mr. Woods, we looked into that, and I am sure our research hasn't been exhaustive on it, but we have placed a lot of reliance on the Pacific Gas and Electric Company case at 2 FPC 300, which I suppose has been cited in the proceedings before. But basically, this was a development on the Feather River in Northern California rather like this one, and it was dependent on a lake with a dam on it like Lake Henshaw. That lake was called Lake Almanor, for storage and release of water for downstream power production.

Now, the company there desired to build some new hydro plants downstream and applied to the Commission for a license, and in that case, the Commission held that the permit and the license must be denied until such time as Lake Almanor was either included in the project license itself or applied for a separate license.

I think if you read in that case — and I am not going to quote extensively from it, but I have looked at the case. If you substitute Lake Henshaw for Lake Almanor, you have a [6076] situation that appears to us at this juncture to be

on all fours with — here is the case.

MR. WOODS: You are saying, of course, Almanor was not before us as an applicant.

MR. CHAMBERS: It was not, no, sir. And you conditioned the grant of PG&E's license on the —

MR. WOODS: Inclusive of Almanor.

MR. CHAMBERS: Yes. Now I assume this — I mean some of this, of course, is stuff that would go into briefs and we are not here to argue the case. But I think that — I wanted you to know, and the gentlemen from the companies to know that we have given this some consideration. And we think that where you have a situation here where it really is an integrated project — now if Escondido Mutual Water Company owned the dam before Lake Henshaw then there wouldn't be any question you could include it, if it was co-owner. Here instead of having joint ownership you have split ownership but a close contractual relationship, which is necessary for the operation of the project. We would submit that you do have jurisdiction. But, you know, I mean you may be more learned in the — you certainly have more experience in these cases than I do.

MR. WOODS: I appreciate your remarks in this respect. I am sure this will be a matter of briefs — or in the briefs as to the jurisdiction of Henshaw.

[6077] But I wanted to point out to the gentlemen the fact situation here: That we are dealing with a non-applicant, not a member of the project as it exists today.

MR. FRIZZELL: Along this line, I don't know whether it would be helpful to inject here, but I understand and would like to proffer — and I guess you gentlemen are as knowledgeable if not more so than I, but that is this proposed task force concept which the Department of Interior is prepared to pick up the tab for to the tune of about \$300,000

which would hopefully have representation of all concerned parties here and hopefully wouldn't be one of these ad infinitum task forces that goes on forever but would conclude their work within a year's time, and that would be their direction at the time of their creation. And that task force, being representatives [sic] of all sides, would explore feasible alternatives and try to reach some kind of an accommodation, and recommendations, perhaps, back here.

MR. ENGSTRAND: I think the task force situation is being discussed, and we will be happy to discuss that further.

If I could go back to Mr. Chambers' point, I am not familiar at the moment with the Almanor case. I want to say this, and I don't want you to get the wrong impression, but I want to say it in a spirit of cooperation but sort of violent opposition, if you understand.

[6078] If the Commission were to say to Escondido you get Henshaw in the project before you get a new license, that might be one thing. But if the Commission were to say to Interior or were to say to Congress in its recommendation for recapture, before we will give the Indians a non-power license or before we recommend recapture we think that you too should get Lake Henshaw — you follow me? — then I think that whether you are right or wrong at least you would be consistent. And the thing that has sort of frosted me, if the word is proper, is the suggestion made by Mr. Pelcyger on behalf of the Indians that the Federal Power Commission should use its authority to give the Indians this license so by getting the license they could choke off Henshaw and some way or other get themselves in a bargaining position with Henshaw that would avoid, maybe, the necessity of having to get Henshaw, or at least put them in a position where they then could deal as people who have things that each other want. And it seems to me like that is an unreasonable attitude if it is taken on behalf of the De-

partment of Interior, the United States of America.

I can understand it being taken on behalf of some private person, and the Indians in that sense as represented by Mr. Pelcyger as a separate Indian Band may very well be understood to take such positions. But I don't understand it as a position that would be acceptable to the Department of [6079] Interior who has responsibilities to Indians and others as well.

MR. PELCYGER: Your Honor, I am prepared, of course, to respond to that, but I thought we were here to discuss the conditions that the Interior Department has said that it wants to impose on a new license.

PRESIDING JUDGE: I think you should have now the opportunity to respond since this is what subject is up. I think you should state your side too at this point.

MR. CHAMBERS: We ought to say, though, that Commissioner Thompson and the Solicitor do have to return to the Department pretty shortly. And it may be that I will be able to remain here and discuss these matters. It may be that — unless this is something you want their participation on, we should move on to something else.

PRESIDING JUDGE: Mr. P, would you rather say it now or say it later? As you choose.

MR. PELCYGER: I would be glad to say it later in the interest of time.

PRESIDING JUDGE: All right.

MR. ENGSTRAND: Your Honor, I consider this to be one of the important things, and particularly in view of the attitude of the Solicitor when he starts in here recognizing whatever it was — I know he wasn't binding Interior and he is here informally, and all this, and that and the other [6080] thing, but just his immediate reaction to Proposition 1 indicates to me the attitude of a responsible official, and

I think that my point is that if — their reaction to my suggestion that the condition would be more appropriate or more — like Almanor, just knowing what you said about Almanor —

MR. CHAMBERS: Yes, we have got the case here.

MR. ENGSTRAND: In the event of recommendation of recapture, in the event of a non-power license, more than in our situation.

PRESIDING JUDGE: All right. But Mr. Pelcyger, if you want to say anything in response now you may. Otherwise, we will go on to Condition 2.

MR. PELCYGER: Let me just say quickly I refer Mr. Engstrand to the State of California versus Federal Power Commission, 345 F 2d. 917 before the Ninth Circuit in 1965, in which it stated the Federal Power Act did not give the districts who were the applicants there the right to use public lands. With regard to those public lands the districts are in the same position as any other applicant for a license. If they are to use those lands they must accept the reasonable restrictions and obligations attached thereto.

Now, Mr. Engstrand knows as well as I do that back in 1922 the Mutual Water Company was able to enter into the [6081] contractual relationship that it did, in part because it represented that Vista's predecessors could transport Henshaw water through its facilities. And that is what essentially led to the 1922 contract between the Escondido Mutual Water Company and the Vista Irrigation District. Essentially the Mutual Water Company was bargaining with this FPC license and bargaining with its right-of-way through the Indian and government lands involved in this case. And essentially we are asking for that same opportunity in 1974 when this license expires.

PRESIDING JUDGE: All right. Now let's get on to Condition 2, which is Mr. Wright's, I think. Do you really see much wrong with Condition 2, Mr. Wright?

MR. WRIGHT: Yes. To the extent that it injects a dual supervision, the ground rules on which that dual supervision is based are rather obscure to me.

The Federal Power Act states that the terms and conditions on a license may be granted — the license is granted by the Federal Power Commission; it has continuing jurisdiction for control in Section 10 of the Act. And it states in effect that in 4(e) that the grant of a license within any reservation — the license shall not interfere or be inconsistent with the purpose for which the reservation was created and shall be subject to and contain such conditions as the Secretary deems proper.

[6082] Here we have a condition which purports to say that the use by Vista of the project and the enjoyment of the lands of the Rincon, La Jolla and San Pasqual, shall be subject to the jurisdiction and control not only of the Federal Power Commission but also with the Department of Interior.

I am not talking about what conditions are imposed at the time that the license is granted. I am talking about continuing controls which Condition 2 would seem to impose, continuing jurisdiction of the Department of Interior in conjunction with the Federal Power Commission.

Later on there are other conditions which speak of the same thing — I think it is No. 6 — and I will cover those subsequent conditions on this point because it is raised here. In later conditions the Indian Bands are brought under the Act. So in effect we have a troika.

MR. CHAMBERS: That is Condition 10, isn't it?

MR. WRIGHT: Yes. But that is superimposed — they have to be read altogether, and if they are there for one

place, why, they are their [sic] for another.

So there is an inconsistency in what I see with Condition 2 and Condition 10, and it is also mentioned in some other places, because you have a troika in 10 and here is a dual capacity here, and there is no place that one can turn as to what are the ground rules for those subsequent [6083] conditions or supervisions, how is that to be exercised.

MR. CHAMBERS: Let me react to it this way, Mr. Wright. Again I read the transcript of your comments on this. It seeme [sic] to me, your Honor, what we have here is we have a project that is licensed by this Commission which has had a very injurious effect on the purposes for which these federal Indian reservations were created. I mean by diverting water out of the San Luis Rey watershed and taking it down into a different watershed. In effect it interferes with the purposes that our Department had in establishing and creating these Indian reservations in the Mission Indian Act and in other administrative actions and statutes.

These reservations were created as a home for these bands of Indians. And they were created also for the purpose of creating a farming community here. And it was contemplated that there would be irrigation and that the purpose of having these reservations here, which is something other than sterile wasteland or desert, was so that these Indians could live there, could have a cultural home and could irrigate their lands.

Now what we are coming in — and I admit we are coming later than we should have, perhaps — we are coming in and saying if you are going to continue to operate this Project 176, if Mr. Engstrand's clients are going to continue to operate it, then it is going to have to be operated in such a way as [6084] to not continue to injure these Indian Bands in the way that it has been doing in the past. And we feel

that to do that the Secretary of the Interior, who has a continuing trust responsibility to these Bands of Indians, does have to have certain regulatory powers over the project. So that is the reason we added this Condition 2. And then it gets into including your client because we see this as an interrelated project.

Now, again, we are not frozen in stone on any of this, but, you know, one purpose of coming up here this morning is to explain, as I understand it, the reasons for them.

MR. WRIGHT: I can appreciate, Mr. Chambers, the basic rationale. What escapes me is the statutory authority.

MR. CHAMBERS: You don't think we have statutory authority to protect these Indian reservations or water rights?

MR. WRIGHT: No, I did not say that. To exercise a continuing jurisdiction independently or in collaboration with, in tandem with the Federal Power Commission.

I cannot turn to anything that would establish any criteria by which that tandem control or supervision is to be exercised.

MR. CHAMBERS: We have a duty to protect and preserve the property of these Indian Tribes. And that is in the Indian Organization Act and the Mission Relief Act.

MR. WRIGHT: It is in the statutory scheme of things [6085] that to be exercised is the definition of the conditions which you ask the Federal Power Commission to impose on its license.

Having approached and having accomplished that, then the carrying out of those conditions becomes a responsibility of the Federal Power Commission.

MR. PELCYGER: I would suggest that — I would think that Mr. Wright is reading Section 4(3) of the Federal Power Act too narrowly. I would say if the Secretary has the authority to impose conditions on the operation of the

license, that in order to protect and utilize the reservations that he also has pursuant to Section 4(e) of the Federal Power Act to see to it that those conditions are enforced and carried out.

PRESIDING JUDGE: Yes, but I don't think you quite catch. I understand Mr. Wright's point, he recognizes a certain power at the time the license is being written. That is why we are here today, as I understand it, His [sic] problem is once they get their license —

MR. PELCYGER: Yes.

PRESIDING JUDGE: — who is the boss thereafter, who is to come around and in effect amend the license by saying, well, I know it says you can do this but we don't think you can, you better stop doing this, you better change it, and this, that and the other way. Who is to change it. [6086] Is that your worry?

MR. PELCYGER: No. I didn't understand Mr. Wright to be talking here about changes. That may get into Condition 4 where we talk about the Mission Indian Reserve. And as I understand Condition 2, though we are not talking about what happens to change the conditions or to change the terms of the license, but as I understand what the Interior Department is saying here, they are saying look, we have to be involved to see to it that these conditions that we have imposed are enforced and carried out. And that is not a matter solely to the Federal Power Commission.

With respect to that matter, we exercise concurrent or joint or in-tandem jurisdiction. At least as I understand Condition 2 —

PRESIDING JUDGE: There is no problem about enforcement, is there, Mr. Wright?

MR. WRIGHT: No.

PRESIDING JUDGE: You recognize that the Bands themselves and Interior have the first responsibility, I think, to see in the next 50 years that the things that actually happen are what the license contemplated. I don't believe that is his problem. The problem is changing their rights and privileges and duties by subsequent actions after the license issues. Isn't that your problem?

MR. WRIGHT: As I read Condition 2 on page 2, Vista [6087] further agrees to be subject to — this is during the term of the license — the jurisdictional control of A, the Federal Power Commission, B, the Department of Interior, with respect to the terms and conditions of the license and Vista's use, occupancy and enjoyment of the land.

MR. RANQUIST: Yes, sir. And there is the very point. We have two different areas here: One is that is included within the license on which the rights-of-way are granted. We have conditions concerning the use of those lands. And we are saying that the Federal Power Commission has jurisdiction and authority pursuant to its license to enforce those. We are also saying the Department of Interior has jurisdiction to go to court or wherever is necessary to protect those Indian lands within that right-of-way and the conditions that have been imposed.

PRESIDING JUDGE: To do what, Harold.

MR. FRIZZELL: Not to change the conditions of the license once issued.

MR. RANQUIST: No, sir.

MR. ENGSTRAND: We have no objection with that.

MR. WRIGHT: We have no objection with that. That is not the way I read it.

MR. FRIZZELL: And only enforcement.

MR. WOODS: It is not the way you read it.

MR. ENGSTRAND: It is not the way in which we read it.

[6088] PRESIDING JUDGE: If 2 means enforcement there is no problem. There is no problem, I am sure.

MR. ENGSTRAND: Interior could have the right to take us before court or the Federal Power Commission or anything, and jurisdiction would be the Federal Power Commission.

MR. WOODS: But there is a procedure, you see.

MR. CHAMBERS: It may be that there should be some kind of further contract between your clients and the Department to protect and preserve the Indian reservations from this kind of injury. And maybe we should discuss that or explore it subsequently.

PRESIDING JUDGE: Yes. I can see Mr. Wright's problem. The man wants them to put another million dollars in that dam. And suppose they do that next year and they borrow the money. And then say three years from now we get a new — or four years from now we get a new Department of Interior, a new Secretary, and new officials, and they say wait a minute, this license is entirely too liberal, we want to change it, we want to do this, we want to say they have got to do this, that and the other. And pretty soon their million-dollar dam to them is worthless. Who pays the million dollars? Is that your worry?

MR. CHAMBERS: I might say I don't read Condition 2 the way Mr. Wright reads it.

[6089] MR. WRIGHT: It is no problem, Mr. Chambers, drafting it.

I do have one other minor point on Condition 2. It purports to subject the Irrigation District to annual charges pursuant to Section 10(e). I have no problem with that. I merely raise the question of construction, as to whether or not the annual

charges that are to be fixed assuming a joint license is granted to Vista and Escondido are to be in one amount borne by either or both of them, joint and severally, if you will, or is it to be separate charge against Vista, a separate charge in equal amount against —

PRESIDING JUDGE: Which one do you want?

MR. WRIGHT: Well, it doesn't matter if the two amounts are together no more than a single reasonable charge.

PRESIDING JUDGE: Mr. Wright, aren't you and I the only ones in this room old enough to remember when we used to buy collars for the shirts, fifteen cents, two for a quarter. I don't think anybody else here is old enough. And I take it what you want, if it is going to be two you want to keep the amount down and not to be double what it would be if it was only one.

MR. WRIGHT: That is correct, your Honor.

[6090] PRESIDING JUDGE: Well, Mr. Woods is a tough bargainer. You can bargain with him one day. He is a real tough bargainer.

MR. WOODS: Your Honor, may I say something, please?

PRESIDING JUDGE: Yes.

MR. ENGSTRAND: They are going to use the collar on alternate days, Your Honor.

MR. WOODS: I would tend to concur with Mr. Wright here in the part of No. 2 that says agrees to be subject to the jurisdiction and control of the Federal Power Commission and the Department of Interior.

You see, gentlemen, the way I interpret the Federal Power Act is that it is the Commission's duty — Congress has given this Commission the right to determine who gets the license and who should condition it.

Now, you have authority under — as was read to you under 4(e), to come up with conditions which would be subject to — the license would be issued subject to and contain such conditions as the Secretary of the Department, meaning you, the Department of Interior, under whose supervision such reservation falls, shall deem necessary for adequate protection and utilization.

MR. CHAMBERS: I might just emphasize here, Mr. Woods, we did not intend by that second sentence to confer a continuing legislative jurisdiction on the Department of the [6091] Interior to set new terms and conditions. And I don't read it that way. But I can see that it could be read that way.

We intended that it be subject to the enforcement by the Department of Interior, that we could enforce the terms and conditions either here or in Federal District Court.

MR. WOODS: Well, there is a process, you see. You can come in here and file a complaint as in fact your gentlemen have done in this case, say the conditions are not met, then we have a proceeding that determines it, you exhaust the administrative remedy and go to court if you have to.

MR. CHAMBERS: We may also want to have a procedure where we would go to court without coming to the Commission.

MR. WOODS: Of course when you do that, gentlemen, you are placing yourselves in lieu of the Federal Power Commission.

PRESIDING JUDGE: You get in trouble with the doctrine of primary administrative jurisdiction.

I can't imagine a court entertaining —

MR. FRIZZELL: I think we would be back here before we spent too long a time in court.

PRESIDING JUDGE: But let's worry about that when the time comes.

MR. WOODS: That is all I wanted to say about it.

PRESIDING JUDGE: Your grandchildren will take that problem, Mr. Woods.

[6092] MR. PELCYGER: Your Honor, one thing I would like to point out is that on page 12 of Exhibit I-78, I think we may be focusing a little bit too literally on the terms of the FPC license. On page 12 of I-78, the letter specifically states that at least at the time it was written the Department didn't express any view with regard to whether the conditions should be the subject of a separate contract or should be directly incorporated in the license. And I think what is emerging here, both with respect to the discussions on Conditions 1 and Conditions 2 — and Condition 2 is that Mr. Wright, in any event, feels that the purposes would be better served by entering into a separate contract rather than making all of these provisions part of the license itself. Now, that might help to clarify some of these jurisdictional and enforcement problems as well. If we are talking about a separate contract, we might not run into the same problems as we would if we were talking about tripartite authority under the terms of one license.

PRESIDING JUDGE: I am not clear what would be the quid for the licensee's quo of such a contract.

MR. PELCYGER: The quid would be —

MR. ENGSTRAND: Getting the license.

MR. PELCYGER: — getting the license.

MR. ENGSTRAND: Right.

MR. PELCYGER: Or getting the use of the Indian lands.

[6093] PRESIDING JUDGE: You mean the Department of Interior should make a private contract with the bands saying it is all right, we will go over to the Power

Commission tomorrow and endorse the new license provided you promise one, two, three?

MR. PELCYGER: Your Honor, that is essentially what was done with the original license, you know. The 1914 contract between the United States and the Escondido Mutual Water Company was incorporated in, attached to, and presumably made a part of the Federal Power Commission license.

PRESIDING JUDGE: It strikes me as a very unusual use of the government's contracting power. To bargain away its sovereign responsibilities sounds to me most unusual.

MR. PELCYGER: It would be saying instead of making these conditions necessarily a part of the license we will enter into a separate contract that accomplishes the same objective and then the contract will be attached to the license. I take it that is Mr. Wright's preference.

PRESIDING JUDGE: But what consideration does it propose from the government for that contract?

MR. PELCYGER: This is the government's statutory responsibility under Section 4(e) of the Federal Power Act and this would be the way that the government would be carrying it out.

I am not —

PRESIDING JUDGE: Well, all right. Let's get going.

[6094] MR. CHAMBERS: Let me just say this, Your Honor: that as you know, this procedure of relicensing Escondido Mutual subject to conditions by the Secretary is not our preferred way of handling this proceeding. I mean we think really that in order to protect these reservations from the kinds of injuries they have suffered in the past that either the license should be recaptured or a non-power license should be issued. But if a license is issued, a renewal license is issued, we want to make sure there are terms and con-

ditions in here that are adequate to protect the bands. And that is really what we are trying to do here.

PRESIDING JUDGE: I didn't get it clear, Mr. Chambers. Page 12 says if any new license. Is it Interior's program that these same conditions would apply to a non-power license issued to the bands?

MR. CHAMBERS: Your Honor, I don't see — oh. No. That is not correct. No. This would be for a relicense of the present licensee.

PRESIDING JUDGE: A new license to Escondido and Vista.

MR. FRIZZELL: Your Honor, I apologize. The Commissioner and the Bureau of Indian Affairs and myself before we even knew we were going to be here made, both of us, prior appointments at 11:00 which we are going to be late for. I appreciate your willingness to hear us out, I wish I could stay for the discussion of the entire bit. I know in my position as a [6095] lawyer I get so far from the adversary system that when I get back into it it is exciting, and I would just love to stay with it, but I just can't. I apologize.

PRESIDING JUDGE: We are having an interesting hearing. We are glad you could come, and we appreciate the chance to meet and to know you, and also appreciate this evidence of your interest in this project which is an important one. It means a lot to the Indians and these bands. I have met a good many of them, I saw what it means to them. It means a lot to the people in Escondido.

MR. FRIZZELL: We feel we are leaving you in the hands of an able spokesman in the person of Reid Chambers here, my associate.

PRESIDING JUDGE: We are glad you came over, Mr. Solicitor and Mr. Commissioner. Good luck in your job.

MR. THOMPSON: Thank you.

PRESIDING JUDGE: Let's take our morning recess, then, while we are interrupting. We are entitled to a recess.

(Whereupon, from 11:02 to 11:15 a. m., the morning recess was taken.)

PRESIDING JUDGE: Let's get on to the Condition 5. Escondido and Vista agree they will not infringe upon the right of the reservations to divert the following quantities of water, so on.

Mr. Engstrand, you don't really have any problem with [6096] that, do you? It is just water.

MR. CHAMBERS: Let's go on to Condition 4.

PRESIDING JUDGE: Yeah, sure.

MR. ENGSTRAND: Well, essentially, of course, that condition would require the licensee to give all the water from the project as well as from Lake Henshaw to the Indians. So consequently, it would be a condition that would take away any benefits for us to be a licensee. So obviously, if that was a condition of our license, we wouldn't want to be licensee. So I can't really think that you are serious about us accepting such a license. That is, how could you expect that we would accept such a license?

I understand why you want the water for the Indians, but I can't understand why you would think we would accept such a license.

PRESIDING JUDGE: Let's get some figures together.

I added up the first column, 25-year annual average comes to 34,000 and something, and maximum column comes to 50,000.

Now, I think we were told yesterday that the average annual quantity going through the conduit is around 13, 14,000, wasn't it, or 15,000 acre-feet, as a rule?

MR. ENGSTRAND: I think what we can say for purposes of discussion here with Mr. Chambers, and without getting into the niceties of the numbers, these numbers are essentially the numbers that Mr. Stetson had in mind that would be [6097] available for use under his plan.

MR. PELCYGER: B-49-A.

MR. ENGSTRAND: B-49-A. And that, you know, he gets some reuse out of it after everything. So that essentially this is the water to implement Mr. Stetson's plan as set forth on B-49-A.

PRESIDING JUDGE: Well, I am not clear what is meant in the conditions, Mr. Chambers, where it says the right of the Indians to divert the following quantities. I don't know what that means, to divert it. Take it from where to where?

MR. CHAMBERS: I guess it would mean to really — maybe more accurately, Judge Ellis, it would be to keep the companies from diverting the waters out of the San Luis Rey, kept with respect to San Pasqual. I mean I guess if there wasn't a dam there diverting waters, why, then the waters would go along in the watershed as they did under natural conditions.

PRESIDING JUDGE: But what is the average annual flow of the river below Henshaw now? 15,000? 12,000?

MR. RANQUIST: At the diversion dam it is something over 19,000 acre-feet a year, Your Honor. So there is that much available for diversion into the canal if it comes at a time that the canal can handle it.

PRESIDING JUDGE: You have got 19 just above the diversion dam.

MR. RANQUIST: Yes, sir.

[6098] PRESIDING JUDGE: How do you figure that anybody is going to get 34 out of it? It says here 34,000, 25-year annual average.

MR. RANQUIST: Because, Your Honor, there are other inflows into the San Luis Rey below that.

MR. CHAMBERS: You mean downstream from the dam.

MR. RANQUIST: Yes.

MR. CHAMBERS: That is what I understood, yes.

MR. RANQUIST: And as shown in Exhibit B-49-A, these are the total uses for all the Indian reservations in the entire watershed. And we are simply saying that they will not interfere with our right to divert that water either from the stream or from the conduit.

PRESIDING JUDGE: Well, suppose we put this condition in. How much water is left for Escondido and Mutual?

MR. CHAMBERS: Your Honor, I think that varies over time. What we want here is to assert as a condition or relicensing the right of the Indians to use these waters for the purposes for which the reservations were created. In other words, for whatever their beneficial needs are. And we have measured that — my understanding is we have measured that in terms of the irrigable acreage on each reservation.

Now, at the present time there is not the capacity of these reservations to use that much water. I mean they are not developed irrigation works. And the Department or the bands [6099] or someone would have to build them before they could use them. So at the present time my understanding is there is not a capacity. Isn't that right, Harold? For these bands to use 34,000 acre-feet or 50,000 acre-feet or any figure like that. And so my understanding is that at least until such project works are developed — irrigation project works, that the Indians wouldn't be using that amount, and it might vary from year to year what water would be available.

PRESIDING JUDGE: Yes, I can see. But I have got the practical point, I am supposed to write a license for this project starting at the diversion dam.

MR. CHAMBERS: Yes, sir.

PRESIDING JUDGE: And perhaps including Henshaw, maybe not, doing something about Henshaw. Anyway, the point is you have got an average of 19,000 there. Now I haven't got anything to do with diverting or not diverting the water below on the river, the sort of thing Mr. Ranquist talked about, the water that flows in at various points up and down here, I haven't got anything to do with them, I can't write a license about them or say somebody can divert it or somebody can't divert it. All I can do is say what happens here. And here we have only got an average of 19. So what would I be doing writing a license in these numbers at this point?

MR. RANQUIST: Yes, sir, I think you are accurate. And we are prepared, and I think Mr. Chambers agrees that we are [6100] prepared to take and change the language there to an amount of water that we would claim at the diversion dam and out of the canal at any given place, in acre-feet per year.

MR. PELCYGER: Your Honor, I have a different concept here.

MR. RANQUIST: This is one in which we don't particularly agree, but go ahead.

MR. PELCYGER: All that the conditions — the condition doesn't — and the FPC, of course, couldn't give the Indians the right to divert any amount of water as against, for example, the Pauma Valley Country Club or their non-Indian neighbors in Pauma Valley. All that the license says is that the Mutual Water Company and the Vista Irrigation District agree that they shall not infringe upon or interfere

in any manner with the following rights of the reservations. In other words, what we are saying here is that the rights — the Indians have a right to that amount of water. Now to the extent it could be satisfied with water flowing in below the diversion dam, all fine and well and good. In that event the only obligation Mutual and Vista have is to supply the difference between what they need and what they can get from other sources.

PRESIDING JUDGE: How much is that?

MR. PELCYGER: Well, I don't know that we have that figure refined other than to the extent shown in Exhibit [6101] B-49-A. But I am indicating here that all that this condition operates against is Mutual and Vista, and it says that you won't divert any water at the diversion dam that will interfere with the Indians' prior rights to this amount of water.

PRESIDING JUDGE: Well, now, look, you see poor Mr. Hanson sitting back there. That is the poor chap that has the problem of doing all these things. He is a good water man and a good engineer. And he is a little impatient with all these lawyers taking so long making up our minds, and I don't blame him.

What is Mr. Hanson supposed to do tomorrow morning with this condition in effect? What is he supposed to do as a practical matter?

MR. PELCYGER: Well, I think the practical —

MR. RANQUIST: Those are the figures we have to provide, I think, Your Honor, under this condition.

PRESIDING JUDGE: We have to work something out.

MR. CHAMBERS: We don't have anything in evidence, for example, about what the downstream inflows are and that kind of thing?

PRESIDING JUDGE: Oh, yes. Now look, do you want 49-A or do you want that later one, 95 or what was that later one?

MR. PELCYGER: 49-A is the numbers that we are dealing [6102] with here. But let me point out, Your Honor, that in terms of practical day-to-day administration, that is going to depend —

PRESIDING JUDGE: Wait just a minute till we got caught up with you on 49-A.

Mr. Stetson for the bands did I think a fine job of sort of schematically showing the whole program starting out with Henshaw, and this is a typical year, as I understand it. A typical year.

MR. WRIGHT: Average, sir.

PRESIDING JUDGE: Average year. 13,350 acre-feet coming down to the diversion dam.

MR. CHAMBERS: Yes.

PRESIDING JUDGE: Some coming in from the sides, you see, coming in. Now, at this point this much gets diverted, 7100. The rest goes down and some more comes in at various points and goes out at various points. And he says that at the end of his sphere of interest beyond Pala, he will end up with the same average they are getting now.

MR. CHAMBERS: In other words, nothing. I mean essentially nothing.

PRESIDING JUDGE: No, he has got some feet coming there. Apparently in the spring there is quite a bit and he ends up with about the same amount of water going through there — in spring months only, actually, I think. [6103] But it is quite an interesting concept, crediting what comes in and taking some out for irrigation here, there and yonder, and he actually programs 7100 acre-feet of diversion. Is that right?

MR. CHAMBERS: Is that what you divert now, Mr. Engstrand?

MR. ENGSTRAND: Pardon?

MR. CHAMBERS: You divert 7100 acre-feet now, or more than that?

MR. ENGSTRAND: When you use the word "you"

MR. CHAMBERS: Your client at this point.

MR. ENGSTRAND: We divert on the average 19,000.

MR. CHAMBERS: Which is really the whole flow of the river at that point.

MR. ENGSTRAND: Now wait. 19,000, and then the Indians get out of the 19,000 they have been getting 1500, and if they could use it all they are entitled to 2500.

MR. PELCYGER: Under Exhibit B-49-A the 7100 is the amount that Mr. Stetson proposes that the Indians would divert through the canal for irrigation on Indian lands. It is not the historical.

MR. CHAMBERS: That is for San Pasqual?

MR. PELCYGER: That is for San Pasqual and also portions of Rincon and La Jolla that can be served directly from the canal.

PRESIDING JUDGE: Some goes into Rincon by this — this [6104] canal goes through Rincon and comes down to San Pasqual.

MR. CHAMBERS: I see.

PRESIDING JUDGE: And they now get some of that 19 at Rincon.

MR. WRIGHT: Your Honor, I think Exhibit B-48 is the present historic use.

MR. RANQUIST: Yes; that is the diagram of what the present use is.

MR. PELCYGER: Can I just indicate here that Condition 3 is not, as I understand it, intended to give any specifics with regard to day-to-day administration, the kind of problem that Mr. Hanson is concerned with. In order to get those specifics you have to read Condition 3 in conjunction with Condition 6. And Condition 6, as I understand it, says each year the Secretary of the Interior will determine how much water is needed on the Indian reservations for use, and as Mr. Chambers indicated, that would depend upon what facilities they have and it also would depend upon how much water is available, what kind of winter the previous year has been, how much water should be, for example, made available for recharge in the ground water basin. If it is a heavy year they may be using more than the quantities of water specified in Condition 3 because if those quantities are only a 25-year average and the ground water basins are down and you have a year like you had in 1916, then you would want to release [6105] water so those ground water basins would be driven up. But the only day-to-day practical administration of the numbers that are found in Condition 3 is handled by Condition 6.

MR. CHAMBERS: Let me state my understanding. Isn't that your understanding, Harold? I mean that — my understanding was that in Condition 3, Your Honor, we were imposing as a condition of the license that the licensee acknowledge that the Indian bands, these bands which are the beneficiaries of the trust responsibility of our Department, have a water right, a prior and paramount water right for the purpose for which the reservation was created or for the purposes for which it was created, and that all totaled up in the abstract that right as measured by the irrigable acreage standard, the Arizona against California standard, is this amount set out in this condition, but that in any given year — not that Mr. Hanson would have to administer this,

but that the Secretary would have to make a determination as to what could be beneficially used on those reservations as of that particular year.

MR. ENGSTRAND: Now, may I ask a —

PRESIDING JUDGE: Wait a minute. Harold, why don't you come up here now —

MR. CHAMBERS: Maybe Harold can help me with that.

PRESIDING JUDGE: Why don't you fill one of these seats so you will all be together.

[6106] MR. CHAMBERS: Yes. I like to have my lawyer with me.

MR. RANQUIST: Let me explain one thing concerning the concept that he talks about, and I am talking here now about the concept that I have explained to Mr. Chambers and to others, and that is that first we maintain the contracts of the past no longer have any effect on the Indians' water right. The Indians' water right will be set by the court; it will be set by the court on the basis of the amount of water that they could have used under natural conditions out of the San Luis Rey River, without reference to any contracts. Okay? We recognize that part of the waters of the San Luis Rey River that are stored behind Henshaw today would have flowed past the Indian reservations under natural conditions. It is that water that they seek a license to divert out of the watershed through these water work facilities. Consequently if they intend to use the Indian lands to divert a portion of that water out of the watershed, then we have a right to insist that as part of the compensation for using Indian lands, that we have a right to some of the water that they have stored here that would have gone on past the Indian reservation and on out to the ocean.

The question is how much. Okay. Now, if we said half of it, if we said 75 percent of it, if we said how much of it, it would be arbitrary. Rather than that we have to come back to the language of the statute which says that we will [6107] direct those conditions necessary to protect the Indian reservations for those purposes for which they were created. They were created for the purpose of irrigating the irrigable lands. Therefore, our claim to water is simply the sufficient water to irrigate the irrigable lands. Anything else, I don't know how we could arrive at the exact amount other than to say that in order to protect the reservations, fulfill our trust responsibility, that in return for using the lands they will provide sufficient water to irrigate the irrigable acres.

Now, that is required not only under the Winters doctrine, but also under the terms of the Mission Relief Act in which it provides that in return for using Indian lands and creating the canals and flumes and ditches under Section 8, it is provided that sufficient water will be released — I left my glasses down there and I can't read it without it. All right. The sufficient water will be released from the canal to meet the needs of the Indians.

MR. CHAMBERS: Upon such terms as shall be prescribed in writing by the Secretary of the Interior.

PRESIDING JUDGE: Let me ask you a question.

You know, Mr. Engstrand here is talking about going back to San Diego, he hopes to get back there this weekend. Mr. Wright is going back to Vista. Mr. Lincoln, you go back to San Diego.

[6108] Now, as quick as they get back there they are going to be seeing their clients, and their clients say what is all this about conditions. Well, this, that and the other.

All I want to know, the client is going to say, how much water do we get?

What answer does your condition suggest that they give to their client? How much water do they get?

MR. CHAMBERS: They get whatever is not needed on the Indian reservation in the particular year as determined by the Secretary under our conditions.

PRESIDING JUDGE: That would be the balance left after 34,000?

MR. CHAMBERS: Well, no, Your Honor, because — let's suppose that they were relicensed on June 1, 1974, under these terms and conditions. The Secretary — I don't know what the figures are, but the reservations cannot beneficially use 34,000 acre-feet next summer. I don't know what they can use. But whatever they can beneficially use, the Secretary would make a determination that that amount could not be interfered with. For example, here, Your Honor, that the Escondido Mutual Water Company couldn't divert water such as would interfere with the right of this reservation to use whatever water it needed in that year. And, you know, when you totaled it all up, there isn't sufficient facilities on these reservations to use 34,000 acre-feet. But it would [6109] vary on a year-to-year basis, and as more facilities are constructed, why, the amount their clients could use under the license would decrease.

PRESIDING JUDGE: Mr. E., what do you want to say about that?

MR. ENGSTRAND: Yes. Well, this has been very helpful to me. And Mr. Chambers, is it fair of me to summarize your position here in Item 3 to be that what you are really doing is, trying to quantify the reserved rights of the Indians under Arizona-California case?

MR. CHAMBERS: I wouldn't so characterize it, no.

MR. ENGSTRAND: Why not?

MR. CHAMBERS: Well, I am looking at the Federal Power statute, Mr. Engstrand, and that statute, which I can't find part of right now — 4(e) — provided that licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created.

Now, these reservations were created — you know, we have been through this. I guess we are kind of arguing the case, but I think that —

MR. ENGSTRAND: No, I would like for you to go ahead. I thought that that was really what you were doing, was under Arizona against California, the Indians have certain [6110] rights but they don't have the right to the water unless they need it. And so you are saying —

MR. CHAMBERS: I think it is similar to that. It is an analogous kind of right, but, you know, I haven't — I am looking at it in terms of this statute rather than in terms of —

MR. ENGSTRAND: All right. Then my next question is having in mind as I understand part of the purpose of this discussion other than to just get us acquainted and have face-to-face discussions about some of these problems is to sort of make a little bit of a record that might relate to the reasonableness of the Secretary's proposed conditions in the eyes of the Federal Powers Commission, maybe. I mean we may get down to that problem.

MR. CHAMBERS: Well, it is conceivable. We want to emphasize, and I might just say on that —

MR. ENGSTRAND: My question is —

MR. CHAMBERS: My counsel will have me on cross, I suppose, or something.

MR. ENGSTRAND: My question is, as Mr. Ranquist pointed out, this condition, as I understood Ranquist, but I want to hear it from you because we get to listen to Ranquist all the time — do you consider it reasonable, and if so, why, that the Department of Interior should ignore the existing contracts that are presently subject to litigation in the [6111] Federal District Court in proposing conditions? In other words, let me put it another way. Wouldn't it be more reasonable for you to say that if we win the Federal District Court case, do this?

MR. CHAMBERS: Well, let me respond to that, then.

I think the Federal District Court case, as you know, is one where again the Department is supporting the position of the Indians in that litigation.

We have something totally different here. We have a company coming in and asking for a license, for a privilege from the government here to operate facilities which you have no right to operate. I mean you have invested money in it in the past and if the facilities are recaptured you will get your net investment, as I understand it. But you have no right to a relicense. And in that situation, if you are going to be using the Indian reservations and the public lands which are administered by our Department, we regard that as a privilege that we can impose under this statute and impose conditions on. And I am not imposing as I see it unreasonable conditions. We are imposing the conditions which we reasonably believe are necessary to protect the purposes for which these reservations were established and which have been impaired, I think, by our operation of this project.

Now, that is the basic position of the Department.

I might emphasize this — and this goes to what I would [6112] have said earlier on the reasonableness: we are not

frozen in stone on these conditions. I think the Solicitor indicated that this morning. And we are willing if Mr. Wright wants to propose some conditions other than Condition 1 which would take care of the purpose that we are concerned with, we will be delighted to consider those, or any that you want to propose.

We have also spent — and I might emphasize on this. We have committed the Department to spending \$300,000 to establish a task force, as you know, to study the overall ramifications of this situation because this isn't a situation that can be solved simply by the Federal Power Commission. I mean we appreciate that.

And there are broader issues here which we want to look into and, you know, we are willing to meet with all parties at all times and consider this openly. But I think we have got a statutory and a trust responsibility that is really fundamental here. And our Department has not exercised it as fully as it might have in the past, but I think the time has now come when we are doing that and when the Area Director who is here, Mr. Finale, and the Solicitor and the Commissioner — and the Department is really committed behind this. We think we are a trustee and we have a responsibility to protect and preserve the water rights of these Indians. And I don't think that we can agree to conditions on a [6113] license, on a privilege from the government where we have a statutory responsibility to protect the purposes for which the reservation was established which would continue to interfere with the purposes for which the reservation was created. And I guess that is our position.

Now, I see that as reasonable in this sense: you say that it may be that your client finds these conditions inconsistent with its acceptance of a project license. I guess my feeling on that is that is a decision for your client. That is not really

MR. ENGSTRAND: No, I understand that.

MR. CHAMBERS: That is not really a problem for the Department. We have a statutory responsibility and a trust responsibility to do certain things. If upon our doing those things your client can't then continue to operate a project profitably, then I guess we are back to the two alternatives that —

MR. ENGSTRAND: You are not insisting on us operating it?

MR. CHAMBERS: Of course not, and we are back to the two alternatives we prefer, which are the non-power license and the recapture.

PRESIDING JUDGE: It has been the water company, it is gradually becoming the city, and the real fight here, it is the City of Escondido against the bands, really, and Vista against the bands. And Vista is a public irrigation district. [6114] There is really no — after the Mutual Water Company gets out of the picture gradually it is not a case of a private company against the bands, but it is the city and the Vista community against the bands. Isn't that fair?

MR. CHAMBERS: Sure.

MR. ENGSTRAND: Yes.

MR. CHAMBERS: And there may be different public responsibilities of the city as against the Department with this trust responsibility. I think it is a unique kind of problem, as Your Honor, you know, appreciates.

MR. ENGSTRAND: Just testing your position one step further without trying to argue with your position —

MR. CHAMBERS: Sure. No, that is okay.

MR. ENGSTRAND: So that assuming that you, the Interior, the United States, the bands, lost the case in San Diego, the Federal District Court, and suppose our contracts are upheld and our position is fully sustained, as it were,

in the Federal District Court case.

As I understand you now, it would still be your position that in view of the fact that we are now before the Federal Power Commission seeking a new license and so forth and so forth and don't have a right, we are seeking a privilege and all those things — even if our contracts are upheld you would think that the conditions you were asking the Federal Power Commission to impose, even though they would in [6115] effect indirectly make our contracts meaningless, would still be reasonable in your views because of your trust responsibilities and your hopes for the Indians?

MR. CHAMBERS: And the statutes.

MR. ENGSTRAND: And the statutes.

PRESIDING JUDGE: May I ask a couple of questions before you answer that, get some background that is very important.

You see, the Department is serious, very serious about the problem that somehow the purposes of the reservation have been impaired by what has gone on, and I want to find out what has happened.

Is it your thought, really, Mr. Engstrand, that it isn't the project which has taken the water away from the Indians, but the contracts of 1891, 1914, and 1922? That those are what took the water away from the Indians? The contracts?

MR. ENGSTRAND: Yes.

PRESIDING JUDGE: What consideration moved to the Indians for that sale of their water?

MR. ENGSTRAND: Well, that is a long story that we haven't developed fully on the record here yet, but I think for purposes of this discussion it is best left to say that the responsible people of the Department of Interior thought at that time that there were sufficient consideration moving back and forth. And the consideration in actuality, if you

want me to elaborate, I don't mind —

[6116] PRESIDING JUDGE: I think it is the very key of this case to me. If you want to maintain the position that it is not the fact of this conduit running across the mountains, that piece of cement that interferes with the purposes of the Indian reservations but the fact that somebody 50 or 100 years ago sold their water and you own it. Now, if so, that is quite a different consideration. I am not asked to write a license that interferes with the purpose of the reservation in that view.

MR. ENGSTRAND: Well, if I can elaborate on that, and when it comes time to presenting some of the matters to you that are in evidence before you now that I am sure you haven't read yet. When our predecessors, the Escondido Irrigation District, first thought up the scheme of diverting waters from the San Luis Rey in 1894, they, of course, knew that there was quite a physical problem involved, and then they knew that they were going to be dealing with Indian lands.

Now, at that time, in 1894, the separation of the Indians in these separate reservations hadn't been around very long. The recommendation of the Smiley Commission was in 1891 trying to create some places for the Mission Indians which were kind of let's call them San Diego County Indians — they were more than that, but for our purposes — trying to get places for them to live. And there was a tendency, I am sure, on the part of the people in the Department of Interior, Congress [6117] and our people to think of the Indians as kind of all one, as it were.

Now, when they go to look at dealing with the Indians, everybody knew that the location of the diversion dam was going to be on the La Jolla Reservation. I think they even referred to it as a portrero. And no one I think really knew,

because they were thinking of them all as one or because they hadn't gone out and surveyed that hilltop corner on Rincon, that the canal really went through Rincon. They even — in the description contained in the 1894 contract the section of ground that is utilized for the canal on Rincon isn't even mentioned. So it is my supposition that they hadn't surveyed it, they didn't know that. But they knew it was on the Indian reservation, and the La Jolla Indian Reservation, and they knew it was very difficult for the La Jolla Indians to use the waters of the San Luis Rey anyway. But they knew that it would be beneficial to the Rincon Indians, the 1894 contract, because they knew then what we know now, that the rains come and the river flows in the winter when you don't want it and it is not there in the summer when you want it. And so that the Indians had their little ditch — the Rincon Indians had ditches that took water up on the La Jolla someplace and down to the Rincon. It was a dirt ditch and it lost a lot of water. And so they saw a benefit to us capturing the water higher up on La Jolla and taking it in our canal and [6118] giving it to the Indians down further, and instead of their water stopping running in April or May they could get water, say, a month or two longer by reason of saving the losses in the canal between — in the river between La Jolla and Rincon. Now, that was the main benefit to the Rincon and the La Jolla in the 1894 contract, just that ditch saving. And then there was no detriment, unless you had a psychological detriment. In 1894 the Department of Interior and the Congress and everybody is developing the West, the Indian reservations have just been created, and so the fact that —

MR. PELCYGER: Excuse me, Your Honor. I am interrupting.

PRESIDING JUDGE: I don't want interruptions. You will have a chance in just a minute. We don't interrupt. We

will agree not to interrupt you.

MR. ENGSTRAND: I will be done in about five minutes.

So with that kind of background, understanding, the Department of Interior and government dealing with us and dealing with the Indians, they saw sufficient consideration to the Indians to permit us to have this right of way to build our canal and to spend all this time and money that we went broke on, you know, the Escondido Irrigation District defaulted on. And in 1910 or something like that the Escondido Mutual Water Company took over.

Now, then, in 1914 is the 6 CFS contract. And what is the consideration for limiting it, as it were, or [6119] quantifying the Rincon rights at that time. And the benefit was that it was — the Department of Interior at that time was considering building a new irrigation system for the Indians on the Rincon Reservation. And to make that system work they had to have a way to get water in the summer. And to get water in the summer everybody that had been around there knew that the river quit flowing and they had to pump water in the summer. How were they going to get power to pump water on the Rincon Reservation? There was no electric power. And they were talking about building a distillate power plant to get the water. And that is when Escondido came along with the scheme, well, we want water down at Escondido area in the winter, and by a power plant on Rincon when the water is running in the winter we can generate power up there in the winter and take that power down to Escondido in the winter; then in the summer when we are irrigating we can take the power down at Lake Wohlford and take it back up to Rincon for the Indians to use to pump the water they want in the summer. And there are extensive correspondence between Interior and Mutual on this circumstance and of the benefit to the Indians by

being able to get power at what was a sweetheart rate. And so that was the benefit in 1914.

Now, then, the benefit in 1922 of Henshaw and the deals there, everybody had just gone through the worst flood in the [6120] history of living man at that time. There was an old Indian that sais [sic] that it was worse than the flood of 1860 or something like that. The flood of 1916.

So that the building of Henshaw and the contracts there and the back-up that Rincon got in the performance of the contract and the free power to pump water in the summer that was assured by Henshaw, that was even better than they got from Escondido, was the consideration at that time.

That in a general broad brush is the kind of consideration.

Now, we can sit here today and wonder if we were making the deal today we might deal differently. But of course that is what happens to all of human beings throughout life, throughout experience and changing circumstances.

PRESIDING JUDGE: I am not asked in the license to write anything about diverting any water out of the river, am I?

MR. WOODS: Sir?

PRESIDING JUDGE: I am not asked to write a license saying they may take water out of the river.

MR. PELCYGER: You are.

PRESIDING JUDGE: I am?

MR. PELCYGER: That is the Escondido-Vista plan. That is what they have been doing. You can't close your

—
PRESIDING JUDGE: Yes. But am I the one that is asked to give — is the Power Commission asked to give the permission —

[6121] MR. PELCYGER: Yes.

PRESIDING JUDGE: — to divert the water?

MR. PELCYGER: The Power Commission is asked to

—
MR. WOODS: No, Your Honor. No. I don't believe you are.

MR. PELCYGER: Excuse me. The —

PRESIDING JUDGE: Are we doing that or are we merely saying you may use the Federal lands for the conduit to carry your water that you already own out of the river?

MR. PELCYGER: For this purpose. And that this has to be in the comprehensive best development of the watershed.

PRESIDING JUDGE: Yes. But am I the one giving them the ownership of the water at the point of diversion, or is that somebody else giving them that?

MR. PELCYGER: Well, as the Federal Power Act states, and as Staff counsel has pointed out repeatedly, it is the responsibility of the applicants to show that they have the right under state law or Federal law to divert and utilize the water. But certainly the Federal Power Commission can't close its eyes to where the water is going. And you are — the Federal Power Commission is authorizing the use of Federal and Indian lands for the purpose of implementing the Escondido and Vista plan, just as the FPC grants a non-power license.

PRESIDING JUDGE: Mr. Pelcyger is first. He has —

MR. CHAMBERS: Maybe I can respond a little bit to Your [6122] Honor's question.

As I see it —

PRESIDING JUDGE: You haven't heard the other side yet. These two fellows are just itching to argue with you a minute before you come to a decision.

MR. CHAMBERS: All right.

PRESIDING JUDGE: Mr. Pelcyger always has some good ideas.

MR. PELCYGER: Your Honor, I didn't think this was an evidentiary hearing, and we have heard a speech from Mr. Engstrand to which I don't propose to respond. Obviously I think you know that the matters that he talked about are matters to be developed through evidentiary procedures, either through the documentary record or through witnesses, and we will respond to Mr. Engstrand, and I gather we have just heard a portion of his brief, when we write our brief. All I want to say at this point is to acknowledge — point out for the record that there are very great differences between us which I assume you have in mind pretty clearly by this point.

PRESIDING JUDGE: Yes.

MR. PELCYGER: But also, and more importantly, I think, to indicate total disagreement with the notion that somehow these old contracts have anything to do with solving this case.

We made the — I think it is fair to say the Indians and the Interior Department made some mistakes in those contracts. Maybe the Vista and Mutual Water Company also made [6123] some mistakes. If it was necessary to implement those contracts that they have the right to utilize these Indians lands and these government lands for the purpose of carrying their water, then that should have been specified and that should have been the consideration that passed to them through these contracts.

Now, that hasn't happened. What has happened is that they have gone to the Federal Power Commission for that part of their scheme which was necessary to implement those contracts, and to implement their design. And that Federal

Power Commission license expires in June of 1974.

Now, Mr. Wright argues, and I don't have any problem with his making that argument and we will address that on the brief, that as a result of Mr. Merrill's letter in 1924, even if we get the project, even if Mutual doesn't, we have to transport their water, and that is a decision that the Commission will make. Mutual doesn't make that argument. Mutual —

MR. ENGSTRAND: Oh, yes, it does.

MR. PELCYGER: Well, Mutual supports Vista's argument. But Mutual does not make an argument, at least you said two days ago on the record that you didn't make the argument that we have to transport Mutual's water. Now, maybe you have changed your mind.

MR. ENGSTRAND: No, no, you misunderstand. Don't say [6124] I changed my mind. Go ahead.

MR. PELCYGER: All right.

PRESIDING JUDGE: You can't quote a — say what another man thinks without inviting him to interrupt you, and I promised we wouldn't interrupt.

MR. PELCYGER: All right.

The record will speak for itself in that regard.

PRESIDING JUDGE: All right.

MR. PELCYGER: All that I am indicating is that if we made mistakes, then perhaps they also made mistakes. If it was necessary to implement their plan that is envisioned by those contracts that they have the right to utilize government and Indian land that is involved in Project 176, that should have been specified in the contract. It wasn't, in our view. It is now a part of FPC License 176. When that license expires, when that what we refer to as a lease expires, their right to use those lands expires and these contracts can't be implemented and become impossible of fulfillment.

MR. ENGSTRAND: Now these contracts meaning, to wit —

MR. PELCYGER: To wit, the three contracts you talked about.

MR. ENGSTRAND: 1894 and 1914.

MR. PELCYGER: And 1922.

MR. ENGSTRAND: Between whom? Between —

[6125] MR. PELCYGER: Between the United States and Henshaw. And we don't have any obligation whatsoever to honor Mutual's and Vista's.

PRESIDING JUDGE: Mr. Woods wanted to get a chance to settle this case.

MR. WRIGHT: I had my hand up also, Your Honor.

PRESIDING JUDGE: Yes, but he stood up. He stood up. I think Mr. Woods gets right of priority here because he stood clear up on his feet.

MR. WRIGHT: I yield any priority that I have over Mr. Woods.

PRESIDING JUDGE: Mr. Woods, what wisdom did you have for us, sir?

MR. WOODS: Thank you, Mr. Wright.

Your Honor, I would address my questions to Mr. Chambers since he is our distinguished guest and I believe the reason for our meeting this morning. We have him here to elicit his views from him on these conditions. And I would ask you to look at No. 3 again.

MR. CHAMBERS: All right.

MR. WOODS: And I believe you have already heard that in effect the 20,570 acre-feet total maximum annual diversion amounts to just about what Mr. Stetson in his Exhibit B-40 would have the Indians receive, you see.

Now, you understand, Mr. Chambers, that this is a [6126] Federal Power Commission proceeding and this is a Federal Power Commission license, you see. The Federal Power Commission will determine the conditions, and even the conditions that you would submit under 4(e) would still be issued in the name of the Federal Power Commission. And I believe you realize and you stated a while ago that it is the Commission, of course, that must decide the — make a finding that the license will not interfere — be inconsistent with the purpose for which the reservations were — then it goes on and says, of course, in this case the Secretary of Interior shall give the Commission conditions. We will get to that in a minute.

MR. CHAMBERS: Yes. That is the part I emphasize.

MR. WOODS: Yes. I think the problem here is really between Interior and the Commission on many things, as to whose authority must prevail here.

PRESIDING JUDGE: I thought we agreed we weren't going to take up today on that. That is a big problem, I agree, but I don't think —

MR. WOODS: Yes, sir, it is a big problem. It is a very crucial thing.

PRESIDING JUDGE: This isn't the day to take it up.

MR. WOODS: All right. We will go to No. 3, Your Honor. But this is an underlying issue, I think, Your Honor, in most all of these conditions.

[6127] PRESIDING JUDGE: I agree but I don't think it does us any good to talk about that here.

MR. WOODS: All right. No. 3 you told the Commission that as a matter of condition, to say in the license that X amount of water, 20,570 acre-feet must be delivered to the Indians. Well, it is vague in my mind. I don't know how the Commission could follow through on this as a

matter of a written condition.

MR. CHAMBERS: No, sir, because the condition doesn't say that. The condition says that the licensee shall not interfere or infringe upon the right of the Indians to divert that amount of water or to keep them from diverting water that would interfere with the Indians diverting that amount of water. It doesn't require the Commission or the licensee to physically deliver any water to the Indians. It merely requires that they abstain from doing certain things.

PRESIDING JUDGE: Yes. But Mr. Engstrand says with a great deal of clarity that he doesn't want to interfere with the Indians' right to do anything. All they want to do is to take the water they own and use it. And the Indians are free to take all the rest of the water they can find, underground, Henshaw or anywhere else, so long as Escondido, the people of Escondido get the water which they own by prior contract, as I understand their point.

MR. CHAMBERS: Let me just discuss this this way, though, and maybe I am wrong about this. But let me just say [6128] how I see the situation and why I think we do have the authority to put this kind of condition on it.

As I have read — and I have read some, but of course not as much as you gentlemen have about the history of the Federal Power Act. But as I understood it, these Federal Power sites were not — no one got a fee simple in these sites. They were short-term, 50-year — fairly long-term, but they were a 50-year license which could expire —

* * *

[6131] * * *

MR. CHAMBERS: But my understanding is that the philosophy of the Act was that they were granting limited monopolies, monopolies limited in time to the use of the hydro power potential of these streams. Now, the time is

up now. And what we are saying is that really, if you want a relicense, if Mr. Engstrand's clients want a relicense and they want to continue to use the lands, the Indian lands and the public lands for which our Department has a responsibility, we don't want them doing that unless they are going to agree to stop interfering with what our Department has administratively determined are the rights of the Indians and these Indian bands.

Now, it may be — I suppose that if they want to litigate the issue of whether the Indians have any rights, we are prepared to litigate that with them in District Court. But we will not consent to a relicensing by this Commission which is a gratuitous act, a discretionary act of the government, which requires that we [sic] certify that the steps have been taken that we deem necessary for the adequate protection and utilization of the reservation. We really will not consent to that unless they will agree that as a part of the cost of having this privilege that they will cease the kind of interferences which we believe have gone on with the [6132] rights for which this Department is the trustee. And I guess that is the philosophy.

PRESIDING JUDGE: In other words, your point is that it is really not material — I mean it is really not controlling what it is [sic] now interfering with the Indian rights, whether that be because we gave a license to use the ditch or whether it be because their contract bought the Indians' water. In either event, the combined operation of the two does take away the water that the Indians would otherwise have.

MR. CHAMBERS: Yes, sir.

PRESIDING JUDGE: I guess they wouldn't even—

MR. CHAMBERS: And we are the trustee for that. Now isn't that what you understand?

MR. WOODS: Your Honor, I am not quite finished yet. I didn't really get to my question.

PRESIDING JUDGE: He didn't get finished.

MR. WOODS: Mr. Chambers, you see, I believe you are asking us to deliver — or to see that this water — that a licensee would deliver this water or in essence be sure that they don't take any steps that the Indians would not get it.

MR. CHAMBERS: Yes. The second but not the first, Mr. Woods.

MR. WOODS: Yes. But you see there is not that much — I don't believe the record will show that there is that much water left over really to make a license operate if you [6133] give the Indians this much water.

MR. CHAMBERS: That may be, and the licensee may want to refuse it.

MR. WOODS: Let me go ahead, then.

MR. CHAMBERS: Yes. I don't know whether that is true or not. I don't know what the record shows. But if that is so, the licensee may not want the license, and that is all right with us. I mean we are prepared, as Mr. Ranquist has pointed out, to operate this as a Federal facility.

MR. WOODS: Let me ask you this: since the water rights are now a matter of adjudication in Judge Schwartz's court down in San Diego, the Federal District Court for the Southern District, how can you ask the FPC to impose these conditions when the Power Commission under Section 9(b) cannot determine water rights and Section 27 has no right to dispense water contrary to those rights? In other words, in my view — and I just wonder if you agree with me — these rights to this water in dispute right now, a matter of litigation, and how can the Commission dispense — first of all it cannot determine water rights, the court will have

to do that, and then it cannot make conditions to dispense with water contrary to those rights, you see.

MR. PELCYGER: Your Honor, if I may, I think that counsel's precise question was asked and answered in the case of State of California versus Federal Power Commission —

[6134] MR. CHAMBERS: You know, honestly, that is exactly what I was going to say. I have it in front of me.

MR. WOODS: I would like to address it to Mr. Chambers.

MR. CHAMBERS: Yes. This is a case again which we have done some research on. The case is one Mr. Pelcyger cited earlier this morning. State of California versus Federal Power Commission. That appears in 349 F. 2d. 917. And it is a Ninth Circuit case in 1965. Now, my brief on the case — and I intended to read this again before I came over this morning, but I haven't looked at it recently. The court considered whether the Commission could attach a condition to a license for a new hydro project on the Tuolumne River in California.

MR. WRIGHT: Immediately north of Yosemite Valley.

MR. CHAMBERS: That is right. The Tuolumne Meadows or whatever you call them. Which might adversely affect the interests of two irrigation districts which claimed prior appropriated irrigation water rights under California law. And those districts claimed that the condition violated the section which you cite, Mr. Woods, the Section 27 of the Act?

MR. WOODS: That is the dispersement section, I believe.

MR. CHAMBERS: Well, the court concluded that the Commission had authority to incorporate in the tendered license a condition which could operate to impair the dis-

trict's full use of their irrigation water rights in some future year.

[6135] We now hold that the Commission has the legal authority to take appropriate action restricting the use of such irrigation rights should the occasion arise. And I don't have the page cite on that.

MR. WOODS: You see, that deals with Section 27, the dispersement of the water; it doesn't determine I believe the water right itself.

MR. CHAMBERS: We don't want the Commission to determine the water right.

PRESIDING JUDGE: I don't think it is profitable for us to sit and argue the power of the Commission to do this or the power of Interior.

The important thing I think is to argue the reasonableness and Mr. Engstrand's question is still not answered. Why is it reasonable, he says, to impose a condition which amounts to taking away the water they bought and paid for years ago. Isn't that what you told me?

MR. ENGSTRAND: Yes.

PRESIDING JUDGE: Mr. Wright, you wanted to add something to that.

MR. WRIGHT: Yes. If I may. And this touches upon Condition 3. I think in this sense Condition 3 should also be taken in conjunction with Condition 6 because the two are in tandem, so to speak.

MR. CHAMBERS: I agree with that.

[6136] MR. WOODS: I agree with that.

MR. WRIGHT: I touch upon the quantities that are posed in Condition 3 which are 25-year annual average total to 34,600 acre-feet per annum and a maximum annual diversion of 50,700. Those are stated in Condition 3 as the

amounts with which Escondido-Vista as licensees, the amount of so-called reserve rights with which no interference would be made on the part of Vista and Escondido as licensees.

Then we turn to Condition 6, and at the top of page 8 on Condition 6, Escondido and Vista must agree that they will provide such water from any — now, what water? Such water. I have construed that as being the quantities specified in Section 3.

MR. CHAMBERS: We will go with those quantities as being a maximum number, Mr. Wright. Now, as I emphasized before, the Indians can't beneficially use it.

MR. WRIGHT: I appreciate that but hear me out, please.

MR. CHAMBERS: All right.

MR. WRIGHT: And they should do that from any and all sources, including storage in Lake Henshaw.

Now, with that introduction, it is my understanding that the rights on the 25-year annual average or the maximum annual diversion are computed as being roughly synonymous with the reserved rights under Winters or Arizona against California. In other words, those are the quantities of [6137] water which would be required — I want to get away from the question of needs — which would be required in order to enable the reservations to irrigate their irrigable lands. That is how those quantities were derived.

MR. CHAMBERS: That is my understanding.

MR. WRIGHT: So then we go to the other facet of the Indians' reserved rights, and it is that limited to those quantities of the total irrigable lands required which would be available and could be physically utilized by the Indians, by each reservation, in a state of nature.

MR. CHAMBERS: I don't know what you mean by a state of nature, Mr. Wright.

MR. WRIGHT: Before the dam. Before Henshaw Dam.

PRESIDING JUDGE: Without any dam.

MR. CHAMBERS: I see what you mean. In other words, you are just reading the so-called natural flow of the river.

MR. WRIGHT: Well, the natural flow. But I think it is defined in several cases as the amount of water within this irrigable concept which physically could be used by the reservation, having conditions as they were in the state of nature.

PRESIDING JUDGE: You read these figures as a lot more than that?

MR. WRIGHT: I read these figures as — yes. And not only these figures, but when coupled with the requirement of [6138] Condition 6, that those amounts be satisfied through a utilization of the regulatory works that have been provided at Lake Henshaw in storage, in ground water utilization, because Condition 6 speaks of providing those quantities of water that are specified under ultimate development.

PRESIDING JUDGE: Actually it tells you in 6, doesn't it, to go out and buy the water. If you have a drought, it says any and all sources. That means the California aqueduct.

MR. WRIGHT: This is another question which I raise which —

MR. CHAMBERS: Does it say that? I don't interpret this to mean that.

MR. RANQUIST: We don't interpret that to say that.

MR. WRIGHT: I am not touching on that.

It does expressly say, however, they will provide such water from any and all sources including storage in Lake Henshaw.

[6139] MR. CHAMBERS: That's correct.

MR. WRIGHT: Now, if the quantities in 3 would not have been available and it is not in the Indians' entitlement

on each reservation in a state of nature, and those quantities can only be made available by the provision of upstream storage and regulation, is not the effect of 3 and 6 together a taking of private property and an expansion of the quantum of the reserved Indian rights, utilizing for that expansion the private upstream facilities?

MR. CHAMBERS: Do you want me to respond to that?

MR. WRIGHT: Yes. In other words, I ask if these — this is the result of the combination of your condition in 3 and 6, is that the result as you see it? If not, why isn't it from the language you have used, and if it is the result of the language that you have used, is that reasonable and what is your authority to do it?

MR. CHAMBERS: I don't construe it as a taking of private property. I think again my response to it — I think it becomes clearer when you deal with the diversion dam. I mean if you take the diversion dam —

MR. WRIGHT: You don't deal with the diversion dam here.

MR. CHAMBERS: Not exclusively with the diversion dam. But we are dealing — basically if you go back to this dam here and you take that out of here and you say you can no longer divert the quantities of water you have been diverting [6140] along the Escondido Canal because this dam is subject to recapture by the public after the fifty years use by the applicant, I suppose that is essentially what we are proposing to do again by the recapture and the non-power license; that that is a facility in which there are no vested rights. And if that dam wasn't there, there would be a lot more water on the Indian reservations for which our Department is responsible for administration.

On the Lake Henshaw issue of it, I think again, the philosophy behind these conditions — and I guess I have

said this before, your Honor — is that the applicants are coming to this Commission for a privilege, for a relicense of a facility to which they have no right, no vested right, no property right. As part of the proceeding our Department gets into it because it provides that the license — any relicense issued shall be subject to and contain such conditions as the Secretary deems necessary for the adequate protection and utilization of the reservations. Now, we don't think that we can adequately utilize and protect our reservations without conditions such as this in here. And I suppose it is not a property right. You are coming to us and asking — you are coming to the federal government, to the United States which has a trust responsibility for these Indians which hasn't been administered very well in the past.

[6141] You are coming and asking for something and we are saying if we are going to grant the license to Escondido we want to impose the conditions which we believe are reasonably necessary to protect the purposes for which these reservations were established. Now, they may be unable to make a deal with you to get Henshaw within the license. You may not submit to the license. They may not accept it. All of that is between you. It doesn't involve us. We have a statutory and a trust responsibility to protect these reservations, and I think that it is absolutely necessary to do that to impose conditions like this.

Now, again, if you — as you said on our first condition, if you have some conditions which we can draft and discuss which you think accomplish the purpose without having some unintended side effects, you know, such as making the Warner Ranch subject to the jurisdiction of the Commission/as a project work or that kind of thing, we are certainly prepared to deal and deal fairly and reasonably on that. I mean we are not frozen in any way on these specific conditions. But we do have a statutory and trust responsi-

bility which we would be remiss, which we would in fact be legally liable to the Bands, I think, if we didn't do it, to insure that they get sufficient waters to carry out the purposes for which these reservations were created long before these canals were built. And that is the philosophy, your Honor, [6142] behind these conditions.

PRESIDING JUDGE: You see —

MR. WRIGHT: Would you accept this one premise: that — would you accept this one premise: that the quantities in Condition 3 would not be available without Henshaw Dam?

MR. CHAMBERS: I don't know what the evidence shows on that.

MR. RANQUIST: The quantities would be available. Just the time at which they are available is changed by Henshaw Dam.

PRESIDING JUDGE: How do you figure that? If you are getting 19,000 on the average now, how do you figure there would be 34,000 without Henshaw — with or without it?

MR. RANQUIST: Because these other quantities are presently in existence already flowing into the river at various points downstream.

PRESIDING JUDGE: Down below the diversion.

MR. RANQUIST: Yes, sir.

MR. WRIGHT: No —

MR. RANQUIST: So all we are saying is the quantities in the 19,000 would come down anyway under the laws of nature and flow to the sea. It would just be Henshaw Dam just changes the time that they arrive.

MR. WRIGHT: Mr. Ranquist, could I remind you of a question which I asked of Mr. Stetson and which is in the

[6143] record. The question was could you derive the quantities on Exhibit B-49 — we hadn't yet had B-49A — for your plan without the use of Lake Henshaw and the regulation that it gives to the upper reaches of the river? His answer was no.

MR. CHAMBERS: But see, my problem is it doesn't matter whether I admit that or not. I mean that — you know, the record shows what it shows. And I don't know what the record shows. I mean I haven't been here. But I would take the position that even if what you say are true these conditions are reasonable because we have Henshaw Dam now. I don't mean we, the government, has it, but there is such a thing as Henshaw Dam; it is in existence.

Now, if Escondido wants to be relicensed to operate a project which obviously it operates in close conjunction with Vista — I mean both of you benefit from this project and you couldn't do the one without the other; they are interrelated — then I think it is reasonable for the Commission and I think the Commission has done it in other cases like the Pacific Gas and Electric case, to require Vista to submit to licensing as a project work as part of a comprehensive and interrelated project. And in order to protect our reservations from this continued depletion that they have existed under for fifty years, we have got to also impose conditions that make sure that the same kind of interference doesn't [sic] continue in the future. Now am I being responsive [6144] to that question, your Honor?

MR. ENGSTRAND: I think so. Could I ask one question?

MR. CHAMBERS: I know you had a —

PRESIDING JUDGE: No, we are getting very close I think.

MR. ENGSTRAND: Is this a fair summary — and I don't want to put words in your mouth.

MR. CHAMBERS: I won't let you.

MR. ENGSTRAND: All right.

MR. CHAMBERS: Fair enough.

MR. ENGSTRAND: Is this fair: That you view the situation facing the Commission in these proceedings as being a kind of ab initio evaluation of what they should do in view of the fact that these facilities exist physically today and the Commission has discretion what to do; it should look at it just in the raw without any contracts or anything else and come to a judgment with that kind of an approach?

MR. CHAMBERS: Let me just check with Harold. I think I know how to answer the question but let me — I think that is generally right with these two provisos. The first proviso is that you are entitled, as I understand it, under the statute, to your net investment, whatever that is, if the projects are not relicensed to you. And that seems reasonable to me. Secondly, and as you know —

MR. ENGSTRAND: That is part of the contract, whatever it is. That is the contract we made with them.

[6145] MR. CHAMBERS: Whatever the net investment is, sure. And I don't know what that is. I don't know what the evidence shows on that if it shows anything. But the second matter is that to the extent that you have any equities above and beyond that, that is one of the reasons that the Department of Interior is supporting the creation of this federal task force and spending \$300,000 to create it to study this standpoint.

Now, it may be that one of the results of that task force would be to recommend legislation to Congress that we would jointly sponsor with you providing for some kind of additional compensation, because there are some equities

here. But in terms of a straight legal right, Mr. Engstrand, my understanding of the Federal Power Act, which as I admit I am sure is not as great as some of the people in this room, is that it doesn't create any vested legal right on the part of a licensee for renewal of that license after the fifty-year period is over and the thing should be considered in that light.

MR. ENGSTRAND: We understand that is arguable and we are not here today to argue that.

MR. CHAMBERS: Sure. I think that is the philosophy on which these conditions are founded.

MR. ENGSTRAND: I have one other question, if I could, your Honor.

[6146] PRESIDING JUDGE: All right. Go ahead, sir.

MR. ENGSTRAND: I understand that the present officers of the Department of Interior, and particularly those responsible for the affairs of the Bureau of Indian Affairs, feel that there were some mistakes made on behalf of the Bands in the past, and assume that that is right — or I shouldn't ask you to assume it. If it is not right, you dispute it.

Now, my question to you is this: If that is true, why don't you as the — in the position that you are in, accept what I interpret to be the will of Congress and seek redress before the Indian Claims Commission in fulfilling your trust responsibility to the Indian Bands instead of seeking through the Federal Power Commission to make Escondido and Vists [sic] do some kind of expiation that the whole country should do?

MR. CHAMBERS: The short answer, of course, is that the Interior Department doesn't have any authority to bring any cases before the Indian Claims Commission. Those are cases brought against the United States. We don't have any

authority [sic] to recommend a suit against your client before the Indian Claims Commission. We couldn't hear such a suit; it doesn't have jurisdiction.

The long answer I guess is — I don't know whether a longer answer is required than that. It is kind of an inconceivable course of action, I think.

[6147] The feeling I have about it, Mr. Engstrand, is this — and this is behind my recommendation: I don't think Indian Tribes are particularly interested, and I don't think our Department is particularly interested in their getting Indian Claims Commission damages, money damages for things that happened long ago. That is not our purpose here. As you know, those damages are computed as of the 1894 value of this water, without interest, and subject to a substantial number of offsets.

I guess what we are interested in is looking to the future, that we have these reservations here which we haven't always adequately protected in the past, and what we are interested in doing is getting water to them. Not a few 19th Centruy [sic] dollars without interest, but water.

Now, it may be that the United States by taking this action in minimizing its liability in the Indian Claims Commission because maybe — I don't know the status of whatever cases have been brought in the Claims Commission by these Bands but it may be that we as a — I am not confessing judgment either, as the Solicitor said this morning, but it may be the Department and the United States is liable for entering into contracts that were of the nature of the contracts that were set up in 1894 and 1914. It may be we breached our trust responsibility then and would be liable to the Bands and the Indian Claims Commission. [6148] By taking this action we minimize that liability of the United States. By going out enforcing our trust responsibility today to provide water

to these reservations, which is what we want to do, we want to look forward about it. I guess we may avoid legal liability, but that is not why we are doing it.

PRESIDING JUDGE: I suggest to you, Mr. Chambers, that the case before the Indian Claims Commission and before this Commission is a good illustration more than reality. Obviously we don't sue ourselves, and the Indian Claims Commission only draws on the Treasure [sic] for judgments. But it is a good illustration of what he has in mind which I take to be this: Assuming the project itself — even assuming the project itself carries no equity of repetition, shall we say, to coin a phrase, after 50 years it is gone, the cement is not there, the project is not there, the dam is not there. Assuming all that, still he says if the government did wrong in the 1890's and 1914's to sell out the Indians' water rights, why are you putting the burden on Escondido to redress that wrong by using Escondido's water and Vista's water and taking it away from them, what they own in fee. Why don't you tell Los Angeles to give them the water or the City of San Diego to give them the water, somebody else? Why put the bee on them in his point as I understand it.

[6149] MR. CHAMBERS: I guess to me the premise seems to be so awfully wrong. I can't accept the premise because I don't read the contracts the way Mr. Engstrand may read them, as selling the Indian water rights, or as permanently divesting the Indians of any title. I can't do that.

MR. ENGSTRAND: In this context —

MR. CHAMBERS: And as you know, we are contesting that in another proceeding.

MR. ENGSTRAND: In this proceeding I have to assume we win the Federal District Court. Of course if we

lose the Federal District Court case then your position becomes much more understandable to me. The thing I can't understand is your position if we win the San Diego case. That is what I can't understand. But we don't need to argue. You have explained it to me, I think pretty well.

MR. CHAMBERS: I mean I think we have made a — whatever happens in the San Diego case, we have made an administrative determination by the Department of Interior as to what is necessary under the terms of the statute to adequately protect and utilize these reservations.

PRESIDING JUDGE: Even if you lose in San Diego?

MR. WOODS: Yes, in contravention of the court's decision if they win it? That is what bugs me. Strike that.

PRESIDING JUDGE: What bothers all of us on it is this: Suppose San Diego decides that this water is Escondido's [6150] and Vista's water; it is not the Indians' water, it is not the San Luis Rey's water, it is not the reservations' water at all. Then it seems to me the problem that you face is is it this project that is interfering with the rights of the — with the program of the reservations — it isn't this project that is doing it at all. It is the loss of that water by the 18 contracts or whatever they lost it. That is what is interfering with it, and we haven't got any business correcting that by a Federal Power Action which has only to do with that cement ditch.

Is that the point?

MR. CHAMBERS: That is a good point.

PRESIDING JUDGE: I am not clear about it.

MR. RANQUIST: May I respond to that a moment, your Honor?

MR. ENGSTRAND: May I be clear for the record. And I don't want to be — but did Gordon get the comments of Mr. Chambers?

THE REPORTER: When?!

MR. ENGSTRAND: Just now when Harold interrupted.

MR. CHAMBERS: You don't want me to talk?

PRESIDING JUDGE: Just be sure a minute. Let's find out —

MR. ENGSTRAND: I am just wondering if he got your comments or you want to elaborate or change your comment.

[6151] (Record read)

MR. ENGSTRAND: That is the word, "That is a good point." That is what Mr. Chambers said.

MR. CHAMBERS: Yes, I will stand on that. What I mean is that is a good point. But I must admit I haven't considered these conditions with that particular point in mind, because we have made an administrative determination which I think — I am fairly confident is right and I think we will win the San Diego case, but of course we vary on that — that these contracts are not a sale of the Indian water right. But the Judge says what if we lose the San Diego case, I take it is what you are saying, then would these still be reasonable conditions.

MR. ENGSTRAND: That's it.

MR. CHAMBERS: And I guess I can't give you — I don't want to make an off-the-cuff reaction about something I haven't thought about before I came in here. Like the other aspects of these conditions we will consider that, and perhaps we ought to talk more about it.

MR. RANQUIST: May I respond to it for a moment?

MR. CHAMBERS: Sure.

MR. RANQUIST: You see, without discussing the merits of the case before the Federal District Court in which we obviously think we have good cause to have these contracts set aside as being of no longer any force or effect,

but [6152] without discussing the merits of that, if the San Diego court ultimately comes down, it divides the water in whatever way, giving the Indians X acre-feet per year and giving to Escondido and to Vista X acre-feet per year for each one of those. We still say that under Section 4(e) in return for using the Indians' lands, that we have a duty to perform. And that duty is to see to it that those Indian lands are not used in any way that is inconsistent with the purposes for which those reservations are created. This imposes upon us the duty, then, of determining what the purposes are, and what we may permit them to do with the use of that land. And we think that that gives us a right, then, to say, well, all right, with respect to the water that they use, that is theirs, under the court decree, that we have a right to utilize part of that water to fulfill the purposes of the Indian reservations in return for their right to use our lands to get it out. That is one. Okay?

[6152] PRESIDING JUDGE: I see.

MR. RANQUIST: The second thing is —

PRESIDING JUDGE: All right. I see your point.

MR. RANQUIST: The second thing is is [sic] that in the use of this they may not do it in a manner which is inconsistent with the purposes for which those reservations were created.

PRESIDING JUDGE: In effect, it is a rent, quit rent. They are asked for pay for the privilege they are [6153] getting of using the conduit space.

MR. RANQUIST: Yes, sir, but it goes beyond that.

MR. CHAMBERS: That is the same response I have been giving before. I think that may be the way I will come out on it too. I want to think about it because you have raised something I haven't thought about before.

PRESIDING JUDGE: He might raise an interesting argument about it more for illustration. You know the San Diego Gas and Electric runs their line somewhere across, and might he not say look, we are willing to do our part to help the Indians maintain the purpose of the reservation, or you are making us do our part, why don't you make San Diego Gas and Electric provide them about 5,000 acre-feet of water a year in return for running their electric line across.

MR. PELCYGER: It is interesting to point out in that connection, your Honor, I think Mr. Nelson testified that he had just concluded negotiations with San Diego Gas and Electric Company in which San Diego Gas and Electric Company built something on the order of \$100,000 worth of transmission lines to serve electricity from their power lines to the homes on the La Jolla Indian Reservation.

MR. ENGSTRAND: We will write you out a check for \$100,000 today if we can get out of here.

MR. CHAMBERS: Of course the daily legal fees must be close to that.

[6154] PRESIDING JUDGE: Mr. Woods has some real pearls of wisdom for us.

MR. WOODS: Well, your Honor — Mr. Chambers, what disturbs me is if the court comes down and we will assume it holds in favor of the Mutual, the City, and it says all right, this is their water, not Indian water, denies your argument under Winters — and that is essentially what it will be if it holds that way, won't it?

MR. CHAMBERS: I think so, but I — you know, I am not prepared to talk in great detail about that.

MR. WOODS: Then how can you come in here under your theory as expressed by Mr. Ranquist and ask this Commission to issue in its name a license which contains conditions that would contravene the court decision [sic]?

That disturbs me.

MR. CHAMBERS: I understand the point. I think I — I mean I understand Mr. Ranquist's response, which I think I agree with Mr. Ranquist's response, but I haven't considered it in this context. I think I would be a fool now to kind of sit up here and say all right, I am now going to make a pronouncement of what the Interior Department would do if we lost that case. I just don't — I think we are not — I mean we are engaged in the spirit of free give and take here and I am willing to take that back and think about it a bit.

MR. ENGSTRAND: Well, I think that has been extremely [6155] helpful. I am encouraged by that comment.

PRESIDING JUDGE: Yes. I think I understand Mr. Ranquist's point, and I think it is not so much a question of legality but a question of reasonableness. They say all right, suppose it is your water. The Judge in San Diego says it is your water. Okay. But if you want to use our Indians' land to carry it somewhere, a price for that privilege is this, namely, A, B, C and D.

MR. WOODS: Yes, sir.

PRESIDING JUDGE: Now, the only remaining question is that a reasonable price. And there I think it is a fair argument on both sides. I am not sure — I sure don't know the answer.

MR. WOODS: Yes, your Honor. And that price must be spelled out specifically.

MR. CHAMBERS: We sure want to go every step to be reasonable here. I mean we want to impose conditions that are reasonable. I think we are required to do that under the law anyway. But, you know, I think that —

PRESIDING JUDGE: Of course it would be hard to be reasonable, to say all right, Mr. Escondido and Mr. Vista,

you built the dam, you built this project, so we will give you another fifty-year license. But you understand that we want all the water. And you can't take any water down to Escondido. That would remind me of the nursery rhyme about [6156] the daughter, yes she can go swimming, hang your clothes up but don't go near the water. And that is about what this would remind me of. I don't see how that would be reasonable.

MR. CHAMBERS: Well, it is different in this sense. We don't have an obligation to have the public lands and Indian reservations of the United States used for this kind of purpose. In other words, this is as if I am a private landowner here and they want to build a canal across my land maybe they have powers of eminent domain for it but this is federal land and I think the Department — as I understand it, the Department's position, and the position I have certainly operated under here, is that if you are going to use our lands, you have got to stop interfering with our reservations. And it may be that that response is the same one, win or lose or draw in District Court in San Diego, that all right, it is your water, but as you said, your Honor, you can't use our land to transport it there without making it right by us. But I want to think about it and I will think about it.

PRESIDING JUDGE: I can see the legality of the conditions. But I do think that it is a question of reasonableness, of being fair to all sides. That is what I am trying to drive at.

Why, Mr. Wright says, look, he has got to spend more than [6157] a million dollars to fix up Henshaw. Escondido says look, we have got people that like water too, and they are using it. Why is it fair to say look, if we want to use this Indian land we have got to give up all the benefit of it instead of sharing the benefit? That is what they can reasonably say.

MR. CHAMBERS: I think it — it gets into the fact — I mean there is no other legal relationship like the government relationship to the Indians. There is a unique responsibility here, and we have got the Bureau of Indian Affairs and an enormous administrative apparatus and an enormous expenditure of funds every year by our Department to fulfill this relationship. This trust responsibility to Indians is an unusual kind of relationship and it may preclude the kind of fairness, the kind of balancing of interest that normally goes on in the political process.

PRESIDING JUDGE: All right. I like to think that we share that in the sense that Indians are people, Indians are citizens, Indians are Americans. As far as I am concerned, they are a very definite and important part of the public interest. But I don't feel a precedence for any one group, white or brown or black or any other over another group. I feel they are all a part of the public, we should all fairly administer their interests. In that sense we share your concern for the Indians.

[6158] Now, Mr. Pelcyger, you wanted to set us right about something.

MR. PELCYGER: I was going to say the same concept I think you expressed very fairly applies to Mr. Wright's concern about inverse condemnation. There is no inverse condemnation going on here because the government is not coming in and taking over anything. The government is saying Mr. Vista, if you want to transport some water through Indian lands then this is the condition we exact. If we don't — if you choose not to do it, go on your merry way, we are not asserting any eminent domain or condemnation or anything else over any of your private rights.

Now the second thing I want to point out is this: I would think that the conditions would be unreasonable if the In-

terior Department had said no water can be transported through the Escondido conduit or if they had determined quantities of the waters for the Indians not by reference to what the Indians need to irrigate their lands but by reference to something else, how much water flowed into Henshaw or how much water flowed into the river. In other words

PRESIDING JUDGE: Yes, I see what you mean.

MR. PELCYGER: Now, there is evidence, of course, in the record that at the time that Henshaw was built and at the time the canal was enlarged the hydrologists expected that [6159] the San Luis Rey River would produce not 15,000 or 19,000 acre-feet at the Escondido diversion but 30,000 acre-feet. Now, nature hasn't fulfilled that prediction. It was optimistic. If nature had fulfilled that prediction, then there would be water for Mutual and Vista to take down through their canal. It is not the Interior conditions that reach out and claim that water; it is nature that hasn't provided it. And so the Interior conditions don't say we are taking all the water; the Interior conditions say you can't take water that the Indians need and the evidence in the case demonstrates that the Indians need.

PRESIDING JUDGE: That is a good point.

MR. ENGSTRAND: Well, on his last point, your Honor, the fact that the hydrologists advising Henshaw were wrong has nothing to do with how much water they were estimating would be available for the Indians. It is just how much water would be available to divert.

MR. PELCYGER: Well, but it might be economic for you to operate your system providing the amounts of water specified in the condition for the Indians if nature had provided 30,000 acre-feet of safe yield to Henshaw. It is not our fault that it doesn't. That is my point. It is not Interior's conditions' fault.

MR. ENGSTRAND: We are all in the same game there: that none of us caused the weather.

[6160] PRESIDING JUDGE: All right. I think we have probably done all we can on No. 3. I understand now that the 34,000 figure means the total acquisition in the whole area. And we can talk about what it really would do at the diversion dam.

It seems obvious to me that any actual condition has got to be limited to what is going to happen at the diversion dam.

MR. RANQUIST: And be released from the conduit.

PRESIDING JUDGE: Yes, of course. And released from the conduit. And I see your objective. So why don't we move on here and see what more — what bout [sic] No. 4. The Secretary reserves the right to impose conditions that are necessary to protect and utilize the water supply available to and required by the lands of the Mission Reserve. What is the problem with that?

MR. WRIGHT: That is the problem, your Honor, that the Secretary's position, as I understand it, being founded on Winters, is not available with respect to the lands of the Mission Reserve.

PRESIDING JUDGE: Oh, yes.

MR. WRIGHT: It is not yet a reservation; there has been no Act proclaiming it. And the question is here again, is it reasonable for the Secretary to impose an additional condition that — this is providing for a future input, a [6161] future limitation on the quantity of water available for diversion in the event that the Mission Reserve lands do achieve reservation status.

PRESIDING JUDGE: Mr. Wright, you are responsible for M-68, and it says right on it, Mission Indian Reserve,

in black and white. Am I to say that your exhibit is false and there isn't any Mission Indian Reserve?

MR. WRIGHT: The status of those lands, your Honor, has been the subject of testimony.

PRESIDING JUDGE: Oh.

MR. WRIGHT: It is in the record that that reserve indicates lands which are set aside from Henshaw with the hopes that they could be granted reservation status through adding those lands to the Pala Indian Reservation and the Pauma Indian Reservation. That action, either by Act of Congress or executive proclamation, has not yet occurred.

Is it reasonable, therefore, to impose a future obligation, unknown in amount, but speaking as of this time, to supply water on the theory that those waters for the supplying of that area would be prior and represent prior rights in the San Luis Rey River.

MR. RANQUIST: Mr. Wright, there is just — let me correct you if I may. The testimony of Mr. Finale is those lands were withdrawn in the year — back in 1902, 1903, but the exact date I don't remember.

[6162]MR. WRIGHT: I appreciate that.

MR. RANQUIST: They were withdrawn at that time and they have been held for the use of the Indians since that time.

MR. WRIGHT: They are not in reservation status.

MR. PELCYGER: We can argue about that.

MR. RANQUIST: That is a legal question we can treat on the brief.

MR. PELCYGER: They have the same legal status as the Chemehuevi Indian Reservation which was adjudicated water rights in Arizona versus California.

MR. WRIGHT: I will be prepared to argue it.

My question is if they are right your condition should speak as of a defined amount.

MR. CHAMBERS: No, I think the problem is this: —

MR. WRIGHT: If they are not right, then how is your condition reasonable?

MR. CHAMBERS: If you are asking me what the basis for imposing this condition was, it is as Mr. Ranquist says: that we have determined that this is a land which is entitled to a water right for the use of the Indians. Whether it has been formally added to the Pala Reservation or not yet. Now, that may be a legal question and we may be wrong on the legal question. I guess that is conceivable. I mean apparently you vary with us on the legal condition, but [6163] again —

PRESIDING JUDGE: Is it in the watershed?

MR. RANQUIST: Yes, sir.

MR. CHAMBERS: Yes.

MR. RANQUIST: As a matter of fact, two of the pieces, your Honor, are right down on the San Luis Rey. Two of the pieces are right here just located on either side of the river at the point where we stood up on the bluff and looked down toward the diversion dam, you see?

PRESIDING JUDGE: Yes.

MR. RANQUIST: Two of those tracts are located right there and in this mountainous area up here is where the balance of all this acreage is located.

PRESIDING JUDGE: Just to the east of Pala.

MR. RANQUIST: YEs [sic], sir, just to the east of Pala. The thing is we haven't made any studies to date on any water requirements for those lands. We don't know what they are.

MR. CHAMBERS: There may not be any.

MR. RANQUIST: We couldn't get economically water to them anyway because they are up on the mountain but there might be some in these little tracts down here who could use some.

PRESIDING JUDGE: Whose land is it today?

MR. RANQUIST: Today it is the United States' land. [6164] It has been held by the United States and it has been withdrawn for the benefit of the Mission Indians.

PRESIDING JUDGE: I don't see to much legal problem. I think Mr. Wright has still got a very fair question about reasonableness, but the legal problem is simple. That is U. S. land.

Now suppose it is Navy land and the man wants to build a new Naval observatory there and it needs a little bit of water so the garden stays green. You know, they like to have the enlisted men come out and keep their garden green. Suppose that was it, it was Navy. This Commission could very possibly, it seems to me, put in a condition that enough water be reserved to take care of that Naval Reservation. I don't think it is — I don't see why it is important whether it is formally an Indian reservation, but Mr. Wright has got a very good point. It is open-ended. As far as Mr. Wright can read this thing, all he knows thirty years from now there will be a housing project putting 10 Indian homes on every acre of all of the Mission lands.

MR. CHAMBERS: I think what we are really saying again, your Honor, is that we have a prior and paramount right to whatever water is necessary for the purposes of the Mission Reserve. And before we are going to consent to the relicensing of a project that goes through the public lands and Indian lands of our Department, we are going to be sure that the [6165] project doesn't interfere with that right. Now, I don't see — the reasonableness question, I

don't see how that can be said to be unreasonable. It may be onerous, it may make the project not feasible.

PRESIDING JUDGE: Well, its vagueness is the problem.

MR. RANQUIST: I believe the Judge is saying we ought to say it is the amount they need but not to exceed something, so that they know there is a limit.

PRESIDING JUDGE: It is the vagueness.

MR. CHAMBERS: Maybe we could do that.

MR. WRIGHT: Also I dispute the premise on which Mr. Chambers based his imposition of the condition. This is a legal problem. We cannot solve that now.

PRESIDING JUDGE: Yes, sir, I agree. That's right.

MR. CHAMBERS: Which is the premise?

MR. WRIGHT: The premise is that the United States has a prior right similar to the Indian right because in my view, in my understanding of the law, it is not entitled to the protection or the sanctity, if you would, of the Winters Doctrine absent a reservation.

MR. CHAMBERS: Well, again, that is a point of law which we just differ on.

MR. WRIGHT: This is our —

MR. ENGSTRAND: One thing, do you — would you — you do recognize or concede that you wouldn't have any right against [6166] people who had rights prior to 1903.

MR. RANQUIST: That's right.

MR. CHAMBERS: We don't concede that? Why not?

PRESIDING JUDGE: Haven't we said enough about this? I have got a little physical problem. It is 1:00 o'clock and I gathered or I assumed from what we said the other day that you wanted to finish this part before lunch.

MR. CHAMBERS: That's correct, sir.

PRESIDING JUDGE: You have got to go, have you?

MR. CHAMBERS: Yes, I have really got other things

—
PRESIDING JUDGE: You are not free to spend the afternoon with us.

MR. CHAMBERS: No, sir, I wouldn't be.

PRESIDING JUDGE: Then I think what we ought to do is spend about five minutes for each of the others and then quit for lunch if Gordon can stand it.

(Discussion off the record)

PRESIDING JUDGE: Let's move on.

MR. PELCYGER: Your Honor, with respect to your question on vagueness, can I simply point out I won't read anything, but that same State of California v. FPC case specifically upholds the validity of a condition attached to an FPC license that is open-ended and vague in the same manner as —

PRESIDING JUDGE: Okay, that is helpful.

[6167] Now 5, no water pumped from the underground above Henshaw shall go through the facilities without the prior written agreement of the five bands subject to the Secretary of Interior.

What is the problem about 5?

MR. WRIGHT: A moment ago, Mr. Chambers, you had indicated that in your mind, if the condition were imposed upon a license granted to Escondido and Mutual, that yes, you could have a license, but subject to the condition that you could not transport water through it. I think you said that such a condition would in your mind be unreasonable.

MR. CHAMBERS: I am having trouble focusing on that.

MR. WRIGHT: I so view this condition. There has been much hydrologic testimony here all of which has pointed to the fact that with a lowered Lake Henshaw, the facility can be operated and managed for the production of a maximum amount of water. The maximum beneficial management of a resource would require the operation of the ground water basin as ground water storage in conjunction with the utilization of the available surface storage. This condition, if imposed, would remove any reasonable person from operating this resource of Henshaw and the ground water basin to its maximum extent.

PRESIDING JUDGE: Why would it stop you?

MR. WRIGHT: If the water — the most beneficial use of [6168] the water is to be transported through the canal, this condition effectively stops any one of these people saying no — stops the production of ground water, and the only reason for producing ground water is to transport it. It seems to me it is an imposition of an absolute prohibition which would prevent or preclude from a practical standpoint the maximum utilization of the total resource. I don't care — I am not speaking of for whose benefit.

PRESIDING JUDGE: Well, do you want to say anything in response to that?

MR. CHAMBERS: Yes. I think the point of this condition was to make it clear that the Department asserts a need to control the ground water as well as the surface water. If this ground water isn't pumped, eventually it is going to find its way into Lake Henshaw, and if it is not diverted at this dam on the La Jolla reservation it would go down to one of the Indian reservations.

MR. WRIGHT: Only if released, or spilled.

MR. CHAMBERS: All right, but I mean at some point Lake Henshaw would get large enough so it would go down.

Now, we want to make sure that it isn't transported in a way — through the Escondido canal in a way that injures the reservations for which we are responsible. And that is the purpose for the condition.

PRESIDING JUDGE: It really fits in with the others. If [6169] we accept the concept that we had explained the other day, that the ground water really amounts to an enlargement of the whole Henshaw Lake — isn't that your point, Harold?

MR. RANQUIST: Yes, sir.

PRESIDING JUDGE: That we have got a lake so wide and we have got a couple of miles on either side, I guess, of ground water storage available, and really it is all one really, I think. I think Mr. Powell was explaining that too. It all amounts to one big lake.

MR. RANQUIST: That's right.

PRESIDING JUDGE: And you want it all handled together with the same sort of control. You don't want them pumping water if that means hurting the lands down below.

MR. RANQUIST: That's right. If that means either transporting it out or changing the time at which it would arrive for use on the reservations without the agreement of the Indians or Interior.

PRESIDING JUDGE: So it fits in with the other business, it seems to me. If they are going to have total control of Lake Henshaw, like 3 talks about, then this fits in with it.

MR. WRIGHT: I appreciate that they could have total control if they bought it.

PRESIDING JUDGE: Well, all right.

Now, we have talked about 6. My problem is we have got 3 or 4 more to go, and I think we ought to talk about — [6170] oh, Mr. Wright, 7 is yours too. It says that you

agree to carry out your contract with the Palas. Mr. Henshaw's contract to drill.

MR. WRIGHT: Your Honor, I believe that issue is before the Federal Court. I deem it extremely unreasonable to impose it unilaterally by Interior as a part of this license. I have so expressed myself to Mr. Ranquist —

MR. CHAMBERS: In the transcript of the earlier hearing, or the — yes. And I don't —

MR. WRIGHT: My position hasn't changed and I don't think it will change in that view.

MR. CHAMBERS: My response to that can be simple. It is really the same response that we have been giving, which is that again, if you are going to use the public lands and the Indian reservations which are administered by our Department —

MR. WRIGHT: This is a contract of Interior, your Honor. Interior is saying our contract is in dispute, we are in litigation over the meaning of that contract in a suit brought on behalf of the United States in a Federal District Court. We don't think much of your argument; you can make it all day long, all night long, as long as the Federal Court will hear you. But if you want this license you adopt our view of that contract.

PRESIDING JUDGE: I don't understand, Mr. Wright. [6171] As I read it it just says you carry out the contract. It says —

MR. WRIGHT: Our argument, your Honor, is we are prepared to carry out the contract. The argument is where the wells which Vista admittedly is obligated to drill are to be drilled.

PRESIDING JUDGE: Oh.

MR. ENGSTRAND: But I think Mr. Chambers said a moment ago that — if I can see if I am right — that his

answer to Mr. Wright is the same answer as it is to Escondido: really that these are old contracts, old things, and we are looking at it — *ab initio*, I used the words, not too well, now, and this is just like — Vista is no different than Escondido in this situation.

PRESIDING JUDGE: I see. This in effect settles that San Diego case by adopting their version of the meaning of the contract.

MR. ENGSTRAND: That is as I understand it.

MR. CHAMBERS: You say the contract doesn't require you to provide 6 cubic feet per second from wells. Is that it?

MR. WRIGHT: No, it doesn't.

PRESIDING JUDGE: It is the place of drilling.

MR. CHAMBERS: Whether it is on or off the reservation.

PRESIDING JUDGE: Yes. What about this problem, [6172] Mr. Chambers? A while ago we said the answers to questions 3 and 6 you are determining on the basis of the rights to maintain the reservation —

MR. CHAMBERS: It is the same problem.

PRESIDING JUDGE: — and not with reference to the contracts. And that the contracts don't really matter too much. Now it seems that there is a contract that benefits the Indians and now we are saying let's require the contract to be carried out. How do you get around those people saying now look, if you want one contract, fine, but you better take our other contracts too?

MR. RANQUIST: It is because of the physical situation. Part of the provision of that contract was to — it was anticipated by the parties there would be 6 cubic feet of water per second flowing live in the stream at the upstream boundary of the Pala Reservation. Part of the purposes of

that reservation is to have sufficient water. There is not sufficient water there today as your Honor knows because there is a golfing green between those two. And it is their operation under the terms of the license taking water out through the conduit which is contrary to the purpose for which that reservation was created and prevents that water from arriving.

Now, we admit that there are others — others facilities which also contribute to the fact it isn't there. We can only [6173] solve them one at a time.

PRESIDING JUDGE: All right.

MR. RANQUIST: And it is the purpose for which the reservation was created.

PRESIDING JUDGE: Are we through about 7?

Then number —

MR. CHAMBERS: But I think it does — it raises a problem that your Honor has stated, and I think it does raise the other problem that we talked about — that I said I would reconsider, at least think about and consider reconsidering, whatever it would be. If we lose the District Court litigation, then there is a greater question of whether our administrative determination, which is that this contract requires what we think it requires, is reasonable. And I am going to — I said I would reconsider that earlier.

MR. WRIGHT: The other point I have had discussions with Mr. Ranquist and I won't burden the record here because I don't think this proceeding is a place to bring them up. This is Project 176. 176 has nothing to do except as an ultimate source of water, perhaps, in a state of nature, with Pala.

MR. CHAMBERS: I can't agree with that. It seems to me if there weren't a Project 176 there would be a lot more water on Pala.

MR. WRIGHT: Query.

[6174] PRESIDING JUDGE: Query? You doubt that?

MR. WRIGHT: Query.

PRESIDING JUDGE: If there were no Henshaw, no diversion dam, do you mean Pala wouldn't have a lot more water than it does now?

MR. WRIGHT: Yes, I do, because there could be intervening uses uncontrolled by Lake Henshaw. You would have floods in the winter and dryness in the summer.

PRESIDING JUDGE: I will hear from Mr. Powell on that this afternoon. That gives you something to do during the lunch hour. Mr. Powell. I will be very much interested in your analysis of that problem, because I think that is helpful.

Now, look 8, I don't think we have got any problem.

MR. CHAMBERS: No. The only difference was there was 2 or 3 years — was whether it was 2 or 3 years.

PRESIDING JUDGE: Yes, but they don't want to do 1700 feet of it.

MR. WRIGHT: Apart from the time, Vista has a problem, as I am sure Escondido does. There are many financial obligations that are being faced in the requirement of filtration of water, in Vista's rebuilding of Henshaw. The undergrounding is one of these, but the question is its timing, the feasibility of the project, that we would all like to approach it in a time frame that would be feasible.

[6175] PRESIDING JUDGE: I will tell you what. You and Mr. Ranquist tomorrow go out to lunch together and come back with an agreement on that and you won't be allowed back in the room until you have got an agreement. How about that? You and Mr. Ranquist agree on that timing proposition.

Now, what is the fuss about 9?

MR. CHAMBERS: Nine, Mr. Wright had one proviso he wanted to add to this. I don't know that we can accept the exact language, but we can work with the concept.

MR. WRIGHT: The concept is all I was suggesting.

MR. CHAMBERS: Isn't that right?

MR. RANQUIST: Yes.

MR. CHAMBERS: That's correct. So we are left with 10.

PRESIDING JUDGE: All right. No use shall be made of the three reservations in connection with the project that has not received a prior written approval of the band, the Interior, and the Power Commission. What is the problem there?

MR. WRIGHT: Here again we have the — this is the troika that I referred to earlier this morning.

[6176] PRESIDING JUDGE: Every morning before Mr. — no, it is that other fellow, who is that fellow that turns it on there at the Rincon? I forget. Anyway, every morning before the man comes to turn on the gate, he has got to call up La Jolla Band, he has to call up the San Pasqual man and the other fellow and the Interior and the Power Commission, can I turn it on today.

MR. WRIGHT: It says no use shall be made.

PRESIDING JUDGE: Does that mean no use other than that hereby prescribed?

MR. PELCYGER: Yes, Your Honor.

MR. RANQUIST: Yes.

MR. PELCYGER: That refers to changes.

MR. WOODS: Then it should say that, Your Honor.

PRESIDING JUDGE: If that is what it means it is rather superfluous. Obviously the license doesn't license anything

except what it says.

MR. PELCYGER: Your Honor, it might have been superfluous if you didn't have 50 years of history to contradict it.

MR. ENGSTRAND: Oh, now.

MR. RANQUIST: Your Honor, in the past —

PRESIDING JUDGE: Well, then, I don't see any problem. If we can work out the language.

MR. CHAMBERS: No changes shall be made in the uses.

[6177] PRESIDING JUDGE: I don't see any great problem in that regard. We can work out language that will work out all right.

MR. WRIGHT: If that is what it means —

PRESIDING JUDGE: Yes. In other words, they don't want you —

MR. CHAMBERS: You have no other problem with it?

PRESIDING JUDGE: They don't want you making up your mind that you want the road to run right down that lady's front yard, Mrs. Matisa. They don't want you to take your right of way away from where it is and run it down her front yard without asking somebody. And it is my recollection of that lady you better not. She was very capable and a very capable representative of her interests.

MR. WRIGHT: Requests for change or modification are before the Commission. Here this is the troika. This is something new to the statutory scheme of things.

MR. RANQUIST: This isn't something new.

MR. WOODS: Yes, it is, Your Honor. This contemplates the fact that people other than the Federal Power Commission will try to impose additional conditions.

PRESIDING JUDGE: You can draft the acceptable version by the time you come back from lunch. How about that?

MR. WOODS: No —

MR. CHAMBERS: There is, we feel —

PRESIDING JUDGE: I don't see any problems. Those are [6178] matters of reasonable drafting. We can work that thing out.

MR. CHAMBERS: We feel there is adequate jurisdiction here on the part of the Secretary of the Interior and on the part of the bands when Indian property is being used both under the Indian Organization Act and the Mission Relief Act.

MR. WOODS: That is our existing dispute.

PRESIDING JUDGE: What else does anybody else have to add before we adjourn for lunch?

MR. WRIGHT: Our thanks to Mr. Chambers.

MR. CHAMBERS: My thanks to you gentlemen.

MR. PELCYGER: I did want to say one thing, but I can wait.

PRESIDING JUDGE: Mr. Pelcyger has got some real words of wisdom we don't want to do without.

MR. PELCYGER: I just have one small matter. I believe it is implicit in Condition No. 6 but not explicit, that the releases of water specified by the Secretary of the Interior on an annual basis will also take into consideration the needs of the La Jolla fishery and campground which has been the subject of testimony in this proceeding. When this letter goes back for reconsideration in the Interior Department, I will urge that that matter which I think is implicit be made explicit.

PRESIDING JUDGE: You can tell Mr. Nelson that we are not forgetting him.

MR. CHAMBERS: Let me make this statement, then, to [6179] see if I can summarize where I think we are at and then see if you gentlemen all agree with me.

We have the transcript of the earlier proceeding. I don't have the date on it, but pages 5024 through 5063 or something like that. And we will also, of course, have the transcript of our colloquy this morning.

With that in mind we will reconsider where I indicated we will reconsider, and we will revise where we have indicated that we will revise the drafting of this letter.

I would like from Mr. Wright before we do that a proposed draft of the conditions he thinks would satisfy our concerns on Section 1, if that is acceptable to you.

MR. WRIGHT: I think they would also substitute for Section 7? Is that not the pumping?

MR. CHAMBERS: The pumping is Section 5, isn't it? No water shall be pumped from the underground basin.

MR. WRIGHT: Yes. It would also be addressed to that.

MR. CHAMBERS: All right. We will be happy to consider that.

PRESIDING JUDGE: I think there ought to be a lot of that. I think Mr. Ranquist and Mr. Wright and Mr. Engstrand, Mr. Lincoln, Mr. Duncan, as well as the chaps across the back, should sit down with Mr. Ranquist on a lot of these proposals. It disturbed me a great deal when this came up to learn that the bands had been in on [6180] it, their thoughts had been taken and been considered, and Mr. Pelcyger several times referred to this as "our" letter, we, we, we did this, we did that.

MR. CHAMBERS: I think that would be inaccurate, Your Honor. I mean we did have some consultation with them. Of course they are the beneficiaries of this trust.

PRESIDING JUDGE: It seemed to me one-sided. It seemed to me that these things ought to be decided in a friendly way around the table the way they have happily been this morning. I think we have all done a great deal of good.

MR. CHAMBERS: I agree but I would resist the implication that this letter was not prepared in and essentially by officials of the Department of Interior. It is not Mr. Pelcyger's letter.

PRESIDING JUDGE: Actually, Mr. Wood [sic], couldn't I — any day that you want to talk about these things I think I could very appropriately adjourn for the afternoon and put you in charge and have an informal conference and see what you could all agree to that would carry out the Department's objectives and still would not be unacceptable. That would be quite an appropriate thing, to interrupt a hearing for a conference.

MR. WOODS: Yes, sir.

PRESIDING JUDGE: Informal conference, in which I [6181] would get out and you would see what you could do to knock heads together, you know?

MR. CHAMBERS: I think there are some bedrock legal questions that separate us. I mean I think that the Department is not going to be able to recede from the basic trust responsibility we feel we have here, and it may ultimately be that our conception of that responsibility is that it does require more water than they can surrender and economically operate the project. But our feeling on that is if that is true, we are not starting — as Mr. Pelcyger said we are not starting with we want 100 percent of the water; we want a certain amount of water to protect the purposes of these reservations. If they can't operate a project within those constraints, then our feeling is there shouldn't be a project relicensed.

PRESIDING JUDGE: Well, gentlemen, this has been very helpful. I suppose the chaps sitting in the back of the room trying to keep awake think we have been wasting our time. But frankly, I think I have learned more this morning than I have in a long time now. And I think we are all greatly benefited by this cooperative interchange, and I am delighted to see this spirit on all sides of being willing to bend and try to help the other side attain their objectives also, which is really the purpose of a conference and a hearing in the long run anyway.

[6182] My thanks for your coming over and convey my thanks again to Mr. Frizzell and to the distinguished Commissioner to whom I wish a lot of luck.

* * *

Excerpts from Bands' and Interior's Report of Environmental Factors Filed April 1, 1974 [Exhibit B-110 pp. 128 (line 2) - 130 (line 11); 132 (line 4) - 134 (line 23); 139 (line 18) - 140 (line 23); 156 (line 14 - 25); 175 (line 1) - 177 (line 14)].

Groundwater Resources. Groundwater supplies beneath most of the Indian reservations can provide, if managed properly and adequately recharged, much of the water necessary for future development of the reservations. The Rincon, Yuima, Pauma and Pala Reservations overlie significant groundwater supplies associated with the San Luis Rey River. The La Jolla Reservation overlies lesser groundwater supplies along the San Luis Rey River. The San Pasqual Reservation does not overlie any of the San Luis Rey River groundwater basins, but is adjacent to a small isolated mountain basin, Woods Valley, which is tributary to the San Luis Rey River.

The unconsolidated deposits are generally permeable and are the source of large quantities of water. Infiltration of runoff from the San Luis Rey River and from the tributary portions of the basin provided most of the recharge to the unconsolidated deposits under natural conditions prior to the exportation of large quantities of water from the watershed through Project No. 176.

The groundwater supplies associated with the San Luis Rey River downstream of Henshaw Dam can be divided into three areas: (1) the San Luis Rey River channel between Henshaw Dam and the eastern boundary of the Rincon Indian Reservation, (2) the Pauma groundwater basin that [129*] extends from the eastern boundary of the Rincon Reservation downstream to Pauma Narrows, and (3) the

*Numbers found within brackets refer to the page number of the original transcript.

Pala groundwater basin that extends from the Pauma Narrows to the Monserate Narrows. The only significant quantities of groundwater available to the La Jolla Reservation are from shallow wells penetrating the unconsolidated deposits along the narrow portion of the San Luis Rey River channel between Henshaw Dam and the eastern boundary of the Rincon Reservation. These deposits do not constitute a major groundwater basin. The Yuima and Pauma Reservations are entirely within the Pauma basin. A large part of the Rincon Reservation overlies the Pauma basin and a large part of the Pala Reservation overlies the Pala basin.

The unconsolidated deposits along the San Luis Rey River are saturated from the headwaters above Warner Valley to the mouth of the river at Oceanside. Prior to heavy pumping, both upstream and downstream of Henshaw Dam, the groundwater basins were full most of the time. Groundwater movement, as shown on Plate 13, generally follows the same basic direction as the surface flow, moving through the alluvial filled channels tributary to Warner Valley into the downstream groundwater basins. Topographic effects, subsurface conditions and pumping influence the direction of groundwater flow. When "natural" or full basin conditions prevailed, groundwater discharged [130] to the surface as springs in Warner Valley and as "rising" water into the river. This discharged water, along with surface runoff and subsurface flow, provided most of the recharge to the groundwater basins downstream of Warner Valley. Under full basin conditions, "rising" groundwater also occurred near Pauma Narrows, southwest of the Pauma Reservation. This "rising" water sustained the surface flow in this area and recharged the Pala groundwater basin underlying the Pala Reservation. Groundwater moved westward out of the Pala basin along the course of the San Luis Rey River.

[132] * * *

The Pauma and Pala groundwater basins comprise the major source of groundwater in the area of investigation. The locations of these basins are shown on Plate 13. The Rincon, Yuima, Pauma and Pala Reservations overlie portions of these two basins. Crystalline basement rocks form the basin boundaries and underlie the unconsolidated deposits which form the groundwater reservoir. These unconsolidated deposits which include Younger and Older alluvium, Older fan deposits, buried lake bed deposits, and decomposed basement rock attain thicknesses of as much as 500 feet, as shown on Plate 13. The thickest deposits are located at the boundary of Pauma and Pala basins east of the Pala Reservation, beneath the southern portion of the Pauma Reservation and about one mile north of the Rincon Reservation. The unconsolidated deposits thin out at the edge of the basins and up the tributary creeks. For this reason, and because of the general downstream movement of groundwater, areas on the upper fringe of the basin, such as the Rincon and Yuima Reservations, are most vulnerable to declining water levels and will be the first to experience decreasing well yields when the basin falls into an overdraft condition.

[133] The Younger alluvium in the Pauma and Pala groundwater basins is deposited along the San Luis Rey River channel and adjacent tributary creeks. These deposits, consisting of boulders, gravel, sand, silt and clay are generally above the water table, but where saturated yield water to wells.

Older alluvium occurs along the edge of the basins and underlies most of the valley floor. It consists of poorly sorted arkosic gravel, sand, silt and clay. It yields water freely to wells. The thickness of the Older alluvium in the Pauma groundwater basin is indicated by water well logs to be

about 160 feet. It has been reported that wells penetrating these Older deposits in the western portion of Pauma Valley flowed, suggesting that these deposits may be locally confined.

Older alluvial fan deposits are present throughout most of the northern portion of the basins. The fans are composed of material ranging in size from boulders more than 5 feet in diameter to clay-size particles. The Agua Tibia mountains to the north are the primary source of material for these deposits. In Pauma Valley these deposits are reported to be about 370 feet deep near the central portion of the valley. Lake sediments have been identified along portions of the fan.

Although the fan deposits exhibit a generally [134] lower permeability than the Younger alluvium, the fan deposits yield moderate to large quantities of water to wells. The fan deposits are in hydrologic continuity, with the Younger alluvium along the San Luis Rey River and tributaries, so that the surface and subsurface flows of the San Luis Rey River and its tributaries provide storage and recharge to the basins.

At Pauma Narrows, the separation between Pauma and Pala groundwater basins, the alluvial fan deposits have restricted the river to a narrow gorge where the basement complex lies at the surface. At times, this contraction causes groundwater in the basin to rise to the surface. A short distance downstream the water percolates to the groundwater basin.

Well yields from the unconsolidated deposits of Pauma and Pala basins are highly variable and are mainly dependent upon the well location. Wells located along the margins of the basins where the unconsolidated deposits are fairly thin yield less water than those penetrating thicker sequences of

deposits or are located adjacent to the San Luis Rey River during periods of surface flow. The permeability of the deposits and well construction also affect well yields and performance.

* * *

[139] * * *

There is not sufficient water in the San Luis Rey River system to support the average annual export from the basin of 14,400 acre feet, to meet the current non-Indian in-basin water requirements, and to meet the requirements for the irrigable lands on the Indian reservations. See Exhibit I-41 and accompanying testimony. Increasing the draft on the groundwater basins to supply the needs of the Indian reservations without increasing replenishment of the basins will result in (1) substantial [140] overdraft, (2) severe deterioration of the quality of water in the basins, and (3) eventual exhaustion of basin supplies. Preventing the non-Indians from pumping from the Pala and Pauma basins would provide additional water for consumptive use on the Indian reservations, but only about 5,500 acre feet per year as opposed to the 14,400 acre feet historically diverted out of the basin which can be used and reused several times if kept within the basin. The current level of non-Indian pumping is about 11,000 acre feet and the return flow is approximately 5,500 acre feet. See Exhibit B-49A.

Therefore, the water exported from the basin through the Escondido canal must be diminished as the Indian lands are developed and perhaps stopped completely within the next 50 years. The only practical alternative would be for suitable exchange arrangements to be made in the future for Metropolitan Water District water for use on reservation lands when, and if, its quality becomes comparable to Lake Henshaw water. Such exchanges at the present time would not

be acceptable because they would add to the deterioration of the groundwater quality in the basins due to the present high concentrations of dissolved solids in Metropolitan Water District water.

* * *

[156] * * *

Groundwater Quality. The main source of groundwater recharging the alluvial deposits along the San Luis Rey River is infiltrated surface water from the San Luis Rey River and its major tributaries. Return flows from imported water also recharge the groundwater basins. Thus groundwater quality is expected to reflect closely the quality of the surface water and to be influenced by the quality of the imported water. Emphasis will be placed on the groundwater quality of the Pauma and Pala groundwater basins. These basins are the only significant sources of groundwater underlying the Rincon, Yuima, Pauma and Pala Reservations.

* * *

[175] The quality of water has a tremendous impact on the yield and quality of crops. Crops such as citrus and avocados are more sensitive to salts than are, for example, apples and pears. The University of California Riverside Extension Service has recently advised the State Water Quality Control Board regarding the effect of water quality on yields of avocados and citrus. The Service has determined that when water quality exceeds .9 millimhos total dissolved solids (TDS),³⁴ it will begin to adversely effect the yield of avocados. In other words, .9 millimhos, or about 575 parts per million TDS, is the maximum point at which there will be no yield decrement. The corresponding figure for citrus is 1.1 millimhos, about 704 parts per million TDS. Beyond

³⁴The Service's "rule of thumb" is that 1 millimhos equals approximately 640 parts per million TDS.

these points, yield decrement is rapid. For avocados, there is a 10 percent decrease in yield when the water quality deteriorates to 1.3 millimhos or about 835 parts per million TDS. For citrus, which are not as sensitive as avocados, there is a 10 percent decrease in yield when the water quality deteriorates to 1.7 millimhos or about 1,100 parts per million TDS. When the water quality deteriorates to these latter levels, 835 parts per million for avocados and 1,100 parts per million for citrus, the Service considers the water marginal for the cultivation of these crops because of yield losses and thus economic losses.

[176] Whether or not one agrees precisely with the projections of the Toups study, it is obvious that with increased development of irrigated lands in and upstream of the basins, continued diversion for export of high quality water through the Escondido canal and increased importation of poor quality Metropolitan Water District water for the increased irrigation requirements in the basins, the quality of groundwater in the basins will deteriorate rapidly. This poses a real, pressing and immediate problem.

In Chapter IX of the Comprehensive Water Quality Management Study, "Alternative Water Quality Management Plans," at page IX-83, one of the major management control measures suggested is to utilize the yield of Lake Henshaw for recharge in the San Luis Rey River at the upstream terminus of the Pauma groundwater basin and replacing that water in the service area of its historic use with imported Metropolitan Water District water. It is stated that: ". . . Since Lake Henshaw water has a total dissolved solids concentration of about 300 mg/l, this measure should substantially increase the salt outflow from the groundwater basins by increasing rising water outflow."

The proposed plan of the Indian Bands and Interior would not utilize all of the yield of Lake Henshaw for groundwater

recharge. Part of it would be utilized for [177] direct delivery of irrigation water to the reservation lands; part of it would be delivered through Lake Wohlford to Vista, in accordance with Table 1; and a large portion would be used for recharge of the Pauma and Pala groundwater basins to support the well pumping necessary to serve irrigation on the Pala, Pauma, Yuima and Rincon Reservations. However, the 50-year plan proposed by the Indian Bands substantially conforms to the above described water quality control measure of the Joint Administration Committee of the Santa Margarita and San Luis Rey Watershed Planning Agencies. If the exportation of high quality San Luis Rey River water from above Henshaw and the diversion dam continues, the deterioration of the quality in the downstream groundwater basins will be rapid.

**Excerpts from Prepared Testimony of Bands' Witness
Stetson Filed May 22, 1974 [Exhibit B-111 p. 8 (lines
9-21); pp. 36 (line 12) - 44 (line 24)].**

Q Please describe the quality of the groundwater of the San Luis Rey River System and the factors that affect it, with particular emphasis on the Pauma and Pala groundwater basins.

A The main source of groundwater recharging the alluvial deposits along the San Luis Rey River is infiltrated surface water from the San Luis Rey River and its major tributaries. Return flows from imported water also recharge the groundwater basins. Thus groundwater quality is expected to reflect closely the quality of the surface water and to be influenced by the quality of the imported water. The Pauma and Pala basins are the only significant sources of groundwater underlying the Rincon, Yuima, Pauma and Pala Reservations.

* * *

[36*] * * *

Q You have stated that there is an "urgent need to do something now about preserving the water quality in the Pala and Pauma basins" and that continuation of the status quo results in "an alarming situation." Could you explain why the water quality problem in the Pala and Pauma basins is so urgent and alarming?

A I refer to the groundwater quality problem in the Pala and Pauma basins as "urgent" and "alarming" because it is clear to me that these basins will be in serious trouble unless something is done and done quickly. This can be shown by reference to criteria that have recently

*Numbers found within brackets refer to the page number of the original proposed testimony.

been formulated regarding the crop tolerance of citrus and avocados and the yield decrement to be expected for citrus and avocados due to salinity levels in irrigation water.

Generally speaking, the quality of water has a tremendous [37] impact on the yield and quality of crops. Avocados are more sensitive to salts than are, for example, citrus, apples and pears.

The University of California Agricultural Extension Service has recently adopted guidelines for the interpretation of the effect of water quality on agriculture, including citrus and avocados. The guidelines, dated January 7, 1974, are reproduced as Exhibit B-127. These guidelines are generally in line with other published information regarding the effect of water quality on citrus and avocados.

The University Agricultural Extension Service has determined that when water quality exceeds .9 millimho TDS, it will begin to affect adversely the yield of avocados. The Service's "rule of thumb" is that one millimho equals approximately 640 mg/l TDS. That means that .9 millimho, or about 575 mg/l TDS, is the maximum point at which there will be no yield decrement for avocados. The corresponding figure for citrus is 1.1 millimhos, about 700 mg/l TDS.

Beyond these points, yield decrement is rapid. For avocados, there is a 10 percent decrease in yield when the water quality deteriorates to 1.3 millimhos or about 830 mg/l TDS. For citrus, which is not as sensitive as avocados, there is a 10 percent decrease in yield when the water quality deteriorates to 1.7 millimhos or about 1,090 mg/l TDS.

With these figures in mind, it is easy to see why [38] I view the water quality problem in the Pala and Pauma

basins as urgent and alarming. Again I make reference to Exhibit B-126. If the 1970 conditions continue unchanged through 1980 (obviously, that is an unrealistic hypothesis because agricultural development on the non-Indian lands in the Pala and Pauma basins is increasing rapidly and with it, so too, in all probability, is the amount of poor quality Colorado River water imported into the area), the average TDS level of the groundwater in the Pala and Pauma basins will reach about 680 mg/1. The yield decrement for avocados begins at 575 mg/1 TDS and we were close to that point in the Pala and Pauma basins in 1970. By the time the water quality deteriorates to 680 mg/1, the avocado growers utilizing groundwater from the Pala and Pauma basins will be suffering significant economic losses — profit skimmed off the top as it were. Again, unrealistically assuming continuation of 1970 conditions, by 1990 the quality of the groundwater in the Pala and Pauma basins will have deteriorated to 820 mg/1 TDS or practically to the point of 10 percent yield decrement for avocados. With this bleak forecast if the status quo continues and with the very high initial investment cost required of citrus and avocados, it is, I think, apparent why something must be done in the near future if the enormously valuable Pala and Pauma groundwater basins are to remain useful and viable resources for the [39] Rincon, Pauma, Yuima and Pala Indian Reservations and for their non-Indian neighbors.

Q What can be done and is there any basis for optimism?

A There is some basis for optimism for several reasons:
(1) because the problem has been discovered and analyzed;
(2) because the affected water users are obviously concerned about the problem and are willing, indeed

anxious, to do something about it (witness the Joint Administration Committee's report and recommendations); and (3) because there are at least three kinds of measures that can be taken to hold the water quality deterioration of the Pala and Pauma basins within reasonable limits.

First, there is the purely physical solution, the construction of salinity control facilities recommended by the Joint Administration Committee. As the figures shown on Exhibit B-122 and on page 20 *supra* indicate, this measure is of limited usefulness, is not nearly sufficient in and of itself to cure the problem, but it does help arrest the rate of degradation.

Second, as Exhibit B-126 shows, the high quality waters of the San Luis Rey River originating above the diversion dam must be available for recharge into the Pala and Pauma basins and to replace the poor quality Colorado River water currently imported into the area. Introducing this water into the basins improves the quality of the groundwater. The more high quality water that can be [40] used for this purpose, the better.

Third, it is obvious to me that the Indians and their non-Indian neighbors in the Pala and Pauma basins must engage in some cooperative and intelligent land use planning that would necessarily involve some voluntary restraints on agricultural development. For example, even if the Indians could develop all of their irrigable lands within, for example, 10 rather than 50 years, it would not be in their long range interests to do so. The same goes for the non-Indians in the area. It is in the mutual interest of the Indians and the non-Indians to maintain the viability of those enormously valuable resources, the Pala and Pauma basins and the groundwater they store.

I would say though that given the existing rather gloomy picture, for these three measures to even have a chance of working two things must happen in the near future: (1) Significant quantities of high quality San Luis Rey River water originating above the diversion dam that has historically been exported from the basin must be kept within the basin; and (2) The Colorado River water currently imported into the Pala and Pauma basins must be significantly reduced or preferably eliminated in their entirety.

Q Would it be possible to eliminate the importation of Colorado River water into the Pala and Pauma basins?

A Preliminary indications are that it would be feasible. [41] Most of the imported Colorado River water now brought into the Pala and Pauma basins is used in the area north of the Rincon Reservation and west of the La Jolla Reservation along Yuima and Potrero Creeks and Highway 76. Very high pumping costs are involved. It would appear that a conduit-siphon could be constructed off of the Escondido conduit on or near the Rincon Reservation that could convey San Luis Rey River water to this area, probably with less pumping. Of course, the detailed engineering still remains to be done.

Q You have stated several times that the Pala and Pauma groundwater basins are extremely valuable resources and that it is extremely important to maintain their continuing viability. Why is this so?

A The Pala and Pauma groundwater basins are, in essence, natural reservoirs that store large quantities of water with less losses than if it were stored in a surface reservoir. As has been noted throughout this proceeding, in Southern California storage of water is essential —

agricultural development, indeed most development, simply cannot take place without it. Storage makes water available when it is most needed and would not otherwise be. My previous testimony and Exhibits B-49 and B-49A also show how dependent parts of the Rincon and all of the Pauma, Yuima and Pala Indian Reservations are on the groundwater of the Pala and Pauma basins. Without the use of these [42] basins, the waters of the San Luis Rey River would not, under present or reasonable foreseeable conditions, be available for use on these reservations. The only conceivable alternative ways of utilizing the waters of the San Luis Rey River on these reservations would be either to take advantage of the existing storage at Lake Henshaw and connect the reservations by pipeline or conduit directly to that source — even then some additional storage would probably be necessary — or to construct new surface water storage facilities. In order to obtain all of the benefits and advantages afforded by the Pala and Pauma groundwater basins, you would have to construct storage facilities to capture not only all of the water above Henshaw Dam, but all of the downstream tributary and main stream inflow as well. This would be a practical impossibility. Yet, as I have stated previously in my testimony, the use of all of that downstream inflow that has historically percolated into the Pala and Pauma basins must be utilized if the ultimate development of the Indian reservations is to be realized.

Either alternative would be extremely expensive — particularly on the scale that would be required to develop all of the reservations' practically irrigable acreage — and probably could not be economically justified.

Other advantages of groundwater storage include filtration at no cost, distribution throughout the basin [43]

at no cost, and it normally provides a more reliable supply in the event of natural or man-made catastrophies.

The State of California has recognized the vital necessity of preserving the quality of the State's ground-water resources. The State's Water Resources Control Board adopted what is known as its "Non-degradation Policy" in Resolution No. 68-16. That resolution states:

Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and *anticipated beneficial use of such water* and will not result in water quality less than that prescribed in the policies. (Emphasis added)

Management Memorandum No. 18, promulgated by the State Board, presents an interpretation of the Resolution. The memorandum states:

It is the Board's intent that this provision shall apply to all surface and groundwaters of the State that have *an existing or potential beneficial use*. Further, it is the Board's intent that, as a general matter, the waters of the State shall not be degraded beyond their present quality by waste discharges due to man's activities. It can be seen that a strict, literal interpretation of this philosophy would mean that no water user could discharge wastewater of a poorer quality into any stream or aquifer. This would require universal transport of waste, desalination, or tertiary treatment of wastes.

The continued exportation of high quality San Luis Rey River water out of the basin through Project No. 176 facilities is inconsistent with the State's [44] non-degradation policy because (1) it makes it impossible

to maintain the existing relatively high quality of the Pala and Pauma basin groundwaters, and (2) it adds to the rate of deterioration of the quality of the groundwater of the Pala and Pauma basins over what would be the case under existing conditions if the water were not removed from the basin.

Q Is the injury that occurs as a result of the increase in the salt concentrations of the groundwater in the Pala and Pauma basins from continued export of Project No. 176 waters from the San Luis Rey River basin reparable or irreparable?

A My studies indicate that the injury is definitely irreparable. Once the salt build-up takes place and the high quality water is transported out of the basin, there is no way to repair the injury. All of my studies and the studies of the Joint Administration Committee indicate that there is no practicable way to reverse the degradation once it occurs. As I previously indicated, time has about run out. There is little room for leeway. The groundwater quality of the Pala and Pauma basins is now at or near the point where degradation results in rapid and drastic yield decrements for avocados, the most likely crop to be extensively developed on the Indian reservations.

**Letter Dated January 15, 1976, From W. W. Lyons,
Deputy Under Secretary of the Interior, to Kenneth
F. Plumb, Secretary of Federal Power Commission,
Filed July 15, 1976 (Exhibits I-78A, I-78B).**

Exhibit I-78A.

[Letterhead]

United States Department of the Interior
Office of the Secretary
Washington, D.C. 20240

January 15, 1976

Honorable Kenneth F. Plumb
Secretary
Federal Power Commission
825 North Capitol Street, N. E.
Washington, D. C. 20426

Re: Project No. 176

Dear Mr. Plumb:

By letter to you dated November 14, 1973, this Department set forth certain conditions deemed necessary for the adequate protection and utilization of the La Jolla, Rincon, San Pasqual, Pauma, Yuima, and Pala Indian Reservations in San Diego County, California, in the event a new license is issued for Project No. 176. The authority of the Secretary of the Interior to impose these conditions is predicated on section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e). We stated at p.12 of the November 14, 1973, letter:

The Department reserves the right to change or modify the conditions set forth in this letter on the basis of the developing record in the Project No. 176 proceedings in fulfillment of the trust responsibilities of the United States.

Subsequently, on December 4, 1973, the Department sent three representatives to the Federal Power Commission's

Project No. 176 hearings to answer questions and engage in a constructive dialogue about the conditions set forth in its November 14, 1973, letter. These three representatives, Mr. Kent Frizzell, who was at the time the Department's Solicitor and is now Under Secretary of the Interior, the Commissioner of Indian Affairs, Mr. Morris Thompson, and the Associate Solicitor for Indian Affairs, Mr. Reid P. Chambers, had a very constructive dialogue with all of the participants in the Commission's hearing including the Staff Counsel and the Presiding Administrative Law Judge. During the course of the hearing, the Department's representatives agreed to modify one of the conditions and undertook to analyze further certain matters that were brought to their attention. The Vista Irrigation District, one of the participants in the Project No. 176 proceeding, agreed to set forth certain of its views in writing for the Department's consideration. (29 Tr. 6067, 6179-6180). The Department's proposed conditions were also the subject of considerable discussion and comment during the course of the hearings on November 27, 1973. (24 Tr. 5023-5064).

During the past two years, certain information has been developed which was not available in November 1973. We refer particularly to the testimony concerning water quality in the Pala and Pauma groundwater basins which was presented at hearings in July 1974, and to the Draft and Final Environmental Impact Statements prepared by the Staff as well as the Environmental Reports filed by Escondido Mutual, the Indian Bands, and the Department of the Interior.

The purpose of this letter is to respond to some of the issues that were raised at the December 4, 1973 hearings and to set forth the Department's final position with regard to the conditions for Project No. 176 pursuant to section 4(e) of the Federal Power Act in the event a new power license is issued to the Escondido Mutual Water Company,

and/or the City of Escondido, and/or the Vista Irrigation District.

Unfortunately, despite the Department's efforts to obtain written statements from both the Escondido Mutual Water Company and the Vista Irrigation District concerning its conditions, no such statements have been forthcoming. Mutual and Vista have not submitted a written statement indicating the conditions on a new license for Project No. 176 that they would find acceptable. Mutual's counsel, Mr. Engstrand, did address this subject in his opening statement when the hearing in this proceeding commenced in September 1973 (2 Tr. 225-227), but his comments are not precise and are subject to varying interpretations. It is noteworthy that virtually all of the conditions suggested by Mutual's counsel that would benefit the Indian Bands involve the storage and release of waters from Lake Henshaw. Lake Henshaw and its outlet works are owned and operated not by Escondido Mutual but by the Vista Irrigation District. Vista is not an applicant or a co-applicant for a license from the Federal Power Commission. Vista's counsel indicated that Vista had not been consulted about the conditions suggested by Mutual's counsel and might have some different ideas on the subject. (2 Tr. 300-301). On January 6, 1976, Mutual's and Vista's counsel indicated that they have not formulated any written alternatives to the conditions outlined by the Department and do not intend to prepare any alternatives or comments.

The Department of the Interior believes that the parties to the Project No. 176 proceeding and the Federal Power Commission would benefit from and should have a written statement (or statements) from Escondido Mutual, the City of Escondido, and Vista setting forth their joint or separate views with regard to alternative conditions in the event a new license is issued for Project No. 176.

Before discussing the specific conditions I would like to touch on general matters which were raised by Vista, Mutual, the Staff and the Presiding Administrative Law Judge and which the Department's representatives indicated would receive their consideration. These two considerations apply to several of the conditions that were proposed in our November 14, 1973 letter.

The first matter concerns a jurisdictional issue, the extent or basis of the Commission's jurisdiction over privately owned facilities located on a non-navigable stream which do not generate power. The question of the Commission's jurisdiction relates to the facilities that are the subject of Condition No. 1 in our November 14, 1973 letter, particularly Henshaw Dam and Lake Henshaw, which facilities are owned by the Vista Irrigation District. Vista is not an applicant for a new license, as previously noted.

It is, of course, undisputed that waters released from Lake Henshaw comprise a significant portion of the waters that are conveyed through Project No. 176 facilities. Water that has been stored in Lake Henshaw is transported through the conduit across Indian and public land and stored in Lake Wohlford, then utilized to generate power at the Bear Valley power plant. In our view, it is this relationship of Lake Henshaw to the licensed Project No. 176 facilities located on Indian and public lands that provides the basis for the Commission to exercise jurisdiction over Vista's privately owned facilities. The Commission has previously indicated not only that it has jurisdiction over upstream regulating reservoirs that significantly affect the operation of downstream Project works, but that as a matter of policy a project should not be licensed unless the upstream facility is included. *Pacific Gas and Electric Company*, 2 F.P.C. 300 (1940). See also *Pacific Gas and Electric Company*, 2 F.P.C. 516 (1940); *Georgia Power Co.*, 37 F.P.C. 620 (1967).

Vista has asserted that including its facilities in a Commission license would amount to a "taking" or inverse condemnation of its property. In our view, neither the Commission nor the Department of the Interior would be "taking" anything. Neither Vista nor Mutual has a right to a license or to the use of Indian and public lands to transport water. Mutual has applied to the Commission for permission to use Federal and Indian lands to convey water for both itself and Vista. That water is used to produce power and to serve water users within their respective service areas. The Federal Government, acting through the Department of the Interior or the Commission, has the power and the responsibility to impose conditions on the use of such lands. Vista and Mutual may reject a license that includes unacceptable conditions and leave their property completely free of the Commission's jurisdiction. They cannot be compelled to accept a license. But if they accept a license that includes conditions imposed by Interior or the Commission, they can hardly complain that their property has been taken. *United States v. Appalachian Electric Co.*, 311 U.S. 377, 426-428 (1940); *State of California v. Federal Power Commission*, 345 F.2d 917 (9th Cir. 1965); and *Southern California Edison Co.*, 8 F.P.C. 364 (1949).

An alternative basis for including Lake Henshaw and Henshaw Dam as Project works in a new power license for Project No. 176 is that both the Dam and the Lake utilize government lands.

The second matter concerns the reasonableness of the conditions proposed by the Department assuming that Mutual's and Vista's positions regarding the validity, meaning, and current effect of the 1894, 1914, and 1922 contracts (Attachments 3-01, 3-06 and 3-08 to Exhibit A-1) is sustained by the Federal courts. This matter was discussed at length at the December 4, 1973 hearing, particularly at 29

Tr. 6149-6156.

Our first comment on the matter is that as we read section 4(e) of the Federal Power Act, it imposes on this Department the obligation to insure that any license issued by the Commission adequately protects affected Indian reservations and enables the resources of the reservations to be utilized. The statute does not call upon the Department to balance the interests of the applicant for the license against the interests of the Indian reservations. We are not required to impose only those conditions that are acceptable to, or deemed reasonable by, the applicant. The sole standard articulated by the statute is whether the proposed conditions are necessary for the adequate protection and utilization of the reservation(s), not whether the conditions are feasible from the applicant's standpoint. If the conditions are not acceptable to the applicant(s) or render the Project unfeasible, then the license will not be offered by the Commission or accepted by the applicant. In the case of a "new" license proceeding, the original licensee may have a right to the return of its net investment in these circumstances. We are not addressing that issue at this time. The Federal Power Act itself, particularly Section 4(e), requires that Commission licenses affecting Federal or Indian reservations be issued only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose of the reservation(s). It also provides that the license must be subject to and contain the conditions that the Secretary of the relevant department deems necessary for the adequate protection and utilization of the reservation(s). If any compromises are to be struck between a licensee's interest and the interests of a Federal or Indian reservation, that is a power retained by Congress. It has not been delegated to the Commission or to the Executive departments.

Second, in our view, whatever the "validity" of the 1914 purported agreement, it cannot be construed as a conveyance or grant of water rights to Mutual. The Court of Appeals for the Ninth Circuit specifically refused to construe an Indian water rights agreement entered into by the Interior Department on behalf of the Yakima Indians as such a conveyance. *United States v. Ahtanum Irrigation District*, 330 F.2d 891, 902-903, 909-910, and 913-914 (9th Cir. 1964), *rehearing denied*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924. Since the 1914 purported agreement, unlike the agreement at issue in *Ahtanum*, involves a transbasin diversion, as opposed to adjustments between adjacent landowners, we do not believe that it can be upheld on the basis of the Secretary's general powers of supervision and management of Indian affairs, now codified in 25 U.S.C. §§ 2 and 9, as was the case with the Yakima agreement. Moreover, the law that has developed subsequent to the first *Ahtanum* decision (236 F.2d 321 (9th Cir. 1956)) has construed the Secretary's management powers under sections 2 and 9 very narrowly and restrictively, not as conferring any new power but only as authorizing implementation of other specific statutory delegations. *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962); *Santa Rosa Band of Indians v. Kings County*, ___ F.2d ___ (9th Cir., No. 74-1565, November 3, 1975). The Secretary of the Interior is not authorized to dispose of Indian trust property. *Mott v. United States*, 283 U.S. 747 (1931); *Cramer v. United States*, 261 U.S. 219 (1923); *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *United States v. Santa Fe Pacific Ry. Co.*, 314 U.S. 339 (1941); and 18 Ops. Atty. Gen. 235 (1885). See also, *e.g.*, 25 U.S.C. §§ 415 and 396(a).

The purported agreements of 1894 and 1914 are also invalid, in our view, because they do not conform to the

mandatory requirements of 25 U.S.C. § 81. See *Pueblo of Santa Rosa v. Fall*, 273 U.S. 319 (1927); *Green v. Menominee Tribe*, 233 U.S. 558 (1914); and 18 Ops. Atty. Gen. 497 (1886).

But even assuming that the purported agreements of 1894 and 1914 are valid and that the 1914 purported agreement operates as a conveyance of the Rincon Indians' *Winters* doctrine water rights to Escondido Mutual, which we deny, our position with regard to the conditions would not be altered. If Mutual (and Vista) wish to rely solely on what they deem to be their contractual rights, they are, of course, free to do so. In this proceeding, however, Mutual (and Vista) are asking the Federal Power Commission to enable them to utilize Indian lands for the conveyance of what they claim are their waters. They are asking for something over and above that which was allegedly obtained by the agreements. Even if the water belongs to Mutual (and Vista), the Department and the Commission may impose conditions that derogate from and infringe upon their water rights in return for the privilege of utilizing Indian and public lands. That was the specific holding of *State of California v. Federal Power Commission*, 345 F.2d 917 (9th Cir. 1965), in which the applicant's water rights were not contested. See also *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426-428 (1940); and *Southern California Edison Co.*, 8 F.P.C. 364 (1949).

There is still another reason for reaching the same result. Under the Federal Power Act, at the expiration of the original license period, the water rights necessary to the operation of any particular project, just like the other property rights included in the project, such as land or interests in land, are subject to divestiture and transfer to others by the Federal Power Commission. That divestiture would require the payment of its net investment to the original licensee.

The divestiture from the original licensee and the transfer to someone else can occur pursuant to the recapture provisions of section 14 of the Federal Power Act or by issuance of a new power or non-power license to a new licensee under sections 15(a) and 15(b) of the Act. (Note that section 14 of the Act specifically refers to the original licensee's water rights as well as to its rights-of-way, lands or interests in lands). Of course, section 15 incorporates this part of section 14. In effect, by accepting the license for Project No. 176 in 1924 which specifically included and referred [sic] to the 1914 contract, the licensee also subjected its water rights to possible divestiture after the expiration of the original license period. Hence, no rights of Mutual and Vista would be impaired or infringed if the Commission should award all of the land, water rights, rights of way, Project works, etc., comprising Project No. 176 to a competing applicant. Since their water rights are subject to divestiture and transfer at the end of the license period, Mutual and Vista cannot insist that the Interior Department accept, honor, and respect their claimed rights in imposing conditions on a new license pursuant to section 4(e). *United States v. Appalachian Electric Power Co.*, *supra*, 311 U.S. at 426-428.

All of the conditions set forth in this letter, as well as our letter of November 14, 1973, are for the sole purpose of adequately protecting and enabling the utilization of the La Jolla, Rincon, San Pasqual, Yuima, Pauma, and Pala Indian Reservations. While there are other interests in the San Luis Rey watershed that are of concern to this Department as well as to other Federal departments, we are here involved only with our statutory responsibility under section 4(e) of the Federal Power Act to these Indian reservations. If the public interest requires the imposition of other conditions that are not related to the reservations af-

fectured by the Project, section 10(g) of the Act delegates that responsibility to the Commission, and our position would be advisory.

Condition 1: Condition 1 of our letter of November 14, 1973, is modified to read as follows:

That Henshaw Dam and Lake Henshaw, together with all wells, pumps, and other physical facilities belonging to the Escondido Mutual Water Company and/or the Vista Irrigation District which are or may be utilized to draw water from the Warner groundwater basin, be included as part of the project works in any new license for Project No. 176 to the Escondido Mutual Water Company, the City of Escondido, and/or the Vista Irrigation District.

Discussion: This change from Condition No. 1 of our November 14, 1973 letter reflects and incorporates the discussion as of the December 4, 1973 hearing (29 Tr. 6058, 6062-6065). It is necessary for the protection and utilization of the Indian reservations that the withdrawal of water from the Warner groundwater basin by Mutual or Vista must be coordinated with the surface water supply in order that certain releases be made at certain times from Lake Henshaw. In order for the Commission and the Interior Department to exercise the requisite control over such withdrawals and releases, Lake Henshaw, Henshaw Dam, and the wells and pumps above Lake Henshaw must be included as part of Project No. 176.

In addition to and aside from this reason for including Lake Henshaw, Henshaw Dam, and such wells and pumps and other facilities as Project works in any new license, this conclusion is required by the comprehensiveness standard of section 10(a) of the Act as discussed above. See *Pacific Gas and Electric Co.*, 2 F.P.C. 300, *supra*.

We recognize that one result of including the facilities specified in Condition No. 1 as Project works in a license issued by the Federal Power Commission under Part 1 of the Federal Power Act is that the facilities may thereby become subject to the Commission's jurisdiction under a section 15 relicensing proceeding.

We regard the definition of the extent of the project boundaries around Lake Henshaw, the issues relating to scenic easements and shoreline control of the land around the lake, and the possible recreation use of such land as the responsibilities of the Commission and its Staff. See Opinion No. 698-698-A, Appalachian Power Company, Project No. 2317, 1974; San Diego County's "Regional Park Implementation Study," as discussed and included at 4-5 and Exhibit A to the Bands' and Interior's November 11, 1974, comments on the Draft Environmental Impact Statement for Project No. 176, partially reproduced at pp. A-54 and A-55 of the Final Environmental Impact Statement.

Condition 2:

That the Vista Irrigation District will not utilize its lands above Henshaw Dam in any manner that will adversely affect downstream water quality or quantity. Before the Vista Irrigation District initiates any uses of its land above Henshaw Dam that may adversely affect downstream water quality or quantity, it must obtain the written consent and approval of the Federal Power Commission, the Commissioner of the Bureau of Indian Affairs, and the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians. This condition shall not apply to the use of the lands above Henshaw Dam for grazing purposes or to the current recreation lease.

Discussion: This condition was also discussed at the [sic] and Interior obviously have an interest in what happens to

the waters of the San Luis Rey River above Lake Henshaw and what effects any such uses may have on the quantity or quality of San Luis Rey River water available downstream. The quality problem can be expected to become more severe in the immediate future as some type of large-scale recreation-home development becomes more probable. Escondido Mutual and Vista will soon have a filtration plant below Lake Wohlford that will treat the San Luis Rey River water before it is distributed to their service areas, so they will not need to be as concerned about upstream water quality as they have been until now.

It is impossible at this time to foresee what developments may take place on Vista's land above Lake Henshaw or what steps may eventually be necessary to protect the Bands' and Interior's interests. Perhaps a treatment plant at the outlet of Lake Henshaw may eventually be required. It is also impossible to define potential uses whose downstream effect may be negligible or *de minimis*. It seems that the only available course is to treat each new potential use on a case by case basis and for the license to require that the parties attempt to reach agreement on any remedial steps that may be necessary.

This Department deems this condition essential to fulfilling its obligations under section 4(e). If Vista is to be authorized to use Indian lands for the conveyance of its Lake Henshaw supply to its service area, it must agree in return to some type of restriction on the uses of its lands above Lake Henshaw for the protection of the interests of the downstream Bands.

Condition 3:

That the Vista Irrigation District agrees to be subject to the terms and conditions of the license and to the jurisdiction and control of the Federal Power Commission.

Discussion: This condition modifies Condition No. 2 of our November 14, 1973 letter. It eliminates one feature that Vista and the Staff found objectionable, subjecting Vista to the jurisdiction and control of the Department of the Interior as well as the Federal Power Commission. Annual charges, which were mentioned in Condition No. 2 of our November 14, 1973 letter, will be the subject of a separate condition. Without this condition, some of the most vital conditions that are necessary for the adequate protection and utilization of the Indian reservations would not be applicable to or enforceable against the Vista Irrigation District.

Condition 4:

That the Escondido Mutual Water Company and the Vista Irrigation District agree that they shall not infringe upon or interfere in any manner with the right of the Indian reservations to utilize the following annual quantities of water:

	<i>25-year Annual Average</i>	<i>Maximum Annual Diversion</i>
(a) La Jolla	4,990 acre-feet	7,285 acre-feet
(b) Rincon	11,140 acre-feet	16,590 acre-feet
(c) San Pasqual	3,590 acre-feet	5,210 acre-feet
(d) Pauma/Yuima (including Mission Reserve lands)	795 acre-feet	1,190 acre-feet
(e) Pala (including Mission Reserve lands)	21,670 acre-feet	31,880 acre-feet

That the Escondido Mutual Water Company and the Vista Irrigation District recognize in their operations on the San Luis Rey River watershed that the reserved and other rights of the Indian reservations to the foregoing quantities of water from the San Luis Rey River shall at all times be prior and paramount to any and all rights of the Escondido Mutual Water Company and the Vista Irrigation District to the waters of the San Luis Rey River.

Discussion: This condition is identical to Condition No. 3 of our November 14, 1973 letter except that the word "divert" has been changed to "utilize" and adjustments have been made in the quantities for the Pala and Pauma Reservations to reflect the water requirements for the irrigable lands of the former Mission Reserve that have been added to these reservations. This condition, read in conjunction with Condition No. 6, requires that any diversion of the waters of the San Luis Rey River through Project No. 176 facilities does not interfere or conflict with the Bands' rights to the beneficial use of the waters of the San Luis Rey River at any given time up to the quantities set forth in these conditions.

This Department recognizes that some of the flows required to fulfill the Bands' rights originate below the diversion dam and that these downstream flows are not subject to control by any current or potential Project No. 176 facilities.

Condition 5:

That no water pumped from the Warner groundwater basin shall be transported through Project No. 176 facilities without the prior written agreement of the La Jolla, Rincon, Pala, Pauma, and San Pasqual Bands of Mission Indians, which shall be subject to the approval of the Secretary of the Interior.

Discussion: This condition is substantially the same as Condition No. 5 of our November 14, 1973 letter. The La Jolla, Rincon, and San Pasqual Indian Reservations should and need to obtain some of the water pumped from the Warner groundwater basin and transported through the Escondido Conduit in return for permitting pumped water to be transported through their land to Lake Wohlford. Water pumped from the Warner groundwater basin is particularly important because, if managed properly, it is a dependable

supply not subject to annual and monthly fluctuations that characterize surface inflows into Lake Henshaw. It is the only dependable supply for the Indian land that would be irrigated directly from the Escondido Conduit.

The Rincon, Pala, Yuima, and Pauma Reservations may also be affected by the pumping from above Lake Henshaw insofar as the pumping has the effect of increasing the capacity of Lake Henshaw and decreasing the natural flow of the river. The increased capacity may make possible the capture of surface flows that would otherwise flow past the Dam and recharge the downstream groundwater basins. The reduction of Lake Henshaw's capacity from about 200,000 acre feet to somewhere between 18,000 and 50,000 acre feet magnifies the potential adverse effects of the pumping above Lake Henshaw on the downstream reservations. In return for consenting to the transportation of some pumped water out of the San Luis Rey River watershed, the Rincon, Pala, and Pauma Bands should therefore be able to obtain some releases of pumped water to recharge the Pala and Pauma ground water basins.

Condition 6:

That the Escondido Mutual Water Company and the Vista Irrigation District acknowledge that the La Jolla, Rincon and San Pasqual Bands of Mission Indians have the right at all times to take from the Escondido Conduit water for agricultural, domestic, recreational or other purposes, or for the purpose of recharging the groundwater basin upon which the Rincon Reservation relies. That the Escondido Mutual Water Company and the Vista Irrigation District will provide water for such purposes at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will release water either at the diversion dam or at the Rin-

con penstock for the purpose of recharging the Pauma and/or Pala groundwater basins at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will provide such water from any and all sources as constitute a part of the San Luis Rey River system, including storage in Lake Henshaw, in satisfaction of this condition, and that the Indian Bands shall not be limited to the so-called natural flow of the San Luis Rey River. The releases required by this condition include releases from Lake Henshaw to maintain optimum fish flows in the San Luis Rey River above the diversion dam and releases for the maintenance of water quality in the Pala and Pauma groundwater basins. The quantities supplied to the Indian Reservations shall not exceed the quantities specified in Condition No. 4 above except when, in the opinion of the Commissioner of Indian Affairs, larger quantities are required for recharge, water quality, or fishery purposes.

Discussion: This condition follows section 8 of the Mission Relief Act of January 12, 1891, (26 Stat. 712, 714). This condition is substantially the same as Condition No. 6 of our November 14, 1973 letter. There are some minor changes in phraseology. The Commissioner of Indian Affairs has been substituted for the Secretary of the Interior since the Bureau of Indian Affairs is primarily responsible for fulfilling the Department's trust obligations to the Indian Bands and the Bureau has day to day management responsibility in this area. The revised condition also enables the Commissioner to modify the annual schedule of releases for the Indian Bands on a monthly or daily basis to take into account changing conditions throughout the water year.

The Bureau of Indian Affairs will consult with the Bands before submitting the water schedules to Mutual and Vista.

The Commissioner will be responsive to the Bands' needs in scheduling such releases.

The next to the last sentence was added to clarify that releases may be requested for the purposes of maintaining an optimum flow for a fishery in the San Luis Rey River above the diversion dam and of maintaining water quality in the Pala and Pauma groundwater basins.

Condition 7:

That the Escondido Mutual Water Company and the Vista Irrigation District will make the releases required by Condition No. 6 until a court of competent jurisdiction rules that the releases need not be made.

Discussion: This condition is required to insure that the Escondido Mutual Water Company and Vista Irrigation District, both of whose interests are adverse to the interests of the Bands, are not put in the position of judging the reasonableness of the Bands' water requirements, determining whether or not the Bands really need the water they are seeking, etc. In some instances the Bands may not have any alternative sources of water other than releases from the Escondido Conduit, and so a delay in making the requested releases could lead to a loss of or damage to crops, or worse. For these reasons, this condition requires that the requested releases be made until some impartial authority rules that they are unreasonable or unnecessary or arbitrary, etc.

Condition 8:

That the Escondido Mutual Water Company and the Vista Irrigation District agree to pay to the La Jolla, Rincon, and San Pasqual Bands of Indians such reasonable annual charges as may be fixed by the Federal Power Commission based on the commercial value of the tribal lands involved for the most profitable purposes for which suitable, including water and power development.

Discussion: This condition provides a basis for determining reasonable annual charges that is consistent with, if not required by, section 10(e) of the Federal Power Act as applied and interpreted in *Montana Power Company v. FPC*, 459 F.2d 863 (D.C. Cir. 1972), *cert. denied*, 408 U.S. 930. This condition also insures that both Escondido and Vista will pay reasonable annual charges for the use of the Indian tribal land since they both benefit from the operations of Project No. 176. It does not matter to the Bands or to the Interior Department how Mutual and Vista divide the annual charges between themselves as long as the Bands receive the total amount due.

This condition is necessary to insure that the Bands receive the maximum reasonable return for the use of their tribal lands involved in Project No. 176.

Condition 9:

That the Vista Irrigation District agrees to fulfill its obligations to the Pala Indian Reservation pursuant to section 6 of the June 28, 1922 contract between the United States and William G. Henshaw by drilling a well or wells upstream of the Pauma Narrows so that a flow of 6 cubic feet per second from said well or wells is delivered to the Pala Reservation. Provided, however, that if the Vista Irrigation District chooses to supply water to the Pala Indian Reservation from a source other than the San Luis Rey River, such arrangements may be negotiated between the Vista Irrigation District and the Pala Band of Mission Indians subject to the approval of the Secretary of the Interior.

Discussion: The Pala Reservation is adversely affected by the exportations of water from the San Luis Rey River watershed through Project No. 176 facilities. For the reasons stated at pp. 41-47 of Exhibit B-40, in order to be made whole the Pala Basin must receive recharge from the up-

stream Pauma Basin. Recharge of the Pala Basin is also required in order to maintain groundwater quality. See Exhibits B-111 through B-127.

Condition 10:

That the grant of any right-of-way for Project Nos. 176 and 559 across Indian land shall not preclude agricultural or other use by the Bands of any land included within the rights-of-way that are not actually utilized for the facility itself. Provided, however, that the Bands shall not erect permanent structures or make such other uses of the land which would interfere with or obstruct the licensee's access to project facilities; and further provided that the licensee or licensees agree to hold harmless the Bands, any members of the Bands or other agents, employees, lessees, or assigns for any damages, whatsoever, that may be caused by the maintenance or repair of project facilities on Indian lands by the licensee or licensees.

Discussion: This condition is substantially the same as Condition No. 9 of our November 14, 1973 letter. One change incorporates the suggestion of Vista's counsel (24 Tr. 5048-5049). The condition was also modified to include reference to Project No. 559, since the transmission line authorized by that license has subsequently been included in this consolidated proceeding. The word "lessees" was added to the last sentence.

Condition 11:

That no new physical or operational use shall be made of the La Jolla, Rincon or San Pasqual Indian Reservations in connection with Project No. 176 operations that has not received the prior written approval of the Band, the Interior Department and the Federal Power Commission.

Discussion: This condition is substantially the same as Condition No. 10 of our November 14, 1973 letter. The

words "new physical or operational" have been inserted to clarify that the condition applies only to any future physical or operational changes in the license, not to the uses that are authorized by the license.

Condition 12:

That the licensee shall cover all of the canal conduit remaining above ground on the San Pasqual Reservation with precast concrete sections and shall remove the unused portion of the concrete canal and flume structures no longer in use and shall restore the land.

Discussion: Condition No. 8 of our November 14, 1973 letter to amend its license application so that a substantial portion of the open canal through the San Pasqual Indian Reservation will be converted to underground pipeline beginning from point 238 as shown in revised Exhibits K-7A and K-8A, and maps submitted by the Escondido Mutual Water Company as Exhibit M-187. The cover to the open above-ground canal and removal of the unused portion are required for public safety and environmental reasons.

Sincerely,

/s/ W. W. Lyons, Deputy Under Secretary
of the Interior

Exhibit I-78B.

Federal Power Commission No. 176

Department of the Interior

Conditions to be Included in any New Licenses:

Condition 1: Condition 1 of our letter of November 14, 1973, is modified to read as follows:

That Henshaw Dam and Lake Henshaw, together with all wells, pumps, and other physical facilities belonging to the Escondido Mutual Water Company and/or the Vista Irrigation District which are or may be utilized to draw water from the Warner groundwater basin, be included as part of the project works in any new license for Project No. 176 to the Escondido Mutual Water Company, the City of Escondido, and/or the Vista Irrigation District.

Condition 2:

That the Vista Irrigation District will not utilize its lands above Henshaw Dam in any manner that will adversely affect downstream water quality or quantity. Before the Vista Irrigation District initiates any uses of its land above Henshaw Dam that may adversely affect downstream water quality or quantity, it must obtain the written consent and approval of the Federal Power Commission, the Commissioner of the Bureau of Indian Affairs, and the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians. This condition shall not apply to the use of the lands above Henshaw Dam for grazing purposes or to the current recreation lease.

Condition 3:

That the Vista Irrigation District agrees to be subject to the terms and conditions of the license and to the jurisdiction and control of the Federal Power

Commission.

Condition 4:

That the Escondido Mutual Water Company and the Vista Irrigation District agree that they shall not infringe upon or interfere in any manner with the right of the Indian reservations to utilize the following annual quantities of water:

	25-year Annual Average	Maximum Annual Diversion
(a) La Jolla	4,990 acre-feet	7,285 acre-feet
(b) Rincon	11,140 acre-feet	16,590 acre-feet
(c) San Pasqual	3,590 acre-feet	5,210 acre-feet
(d) Pauma/Yuima (including Mission Reserve lands)	795 acre-feet	1,190 acre-feet
(e) Pala (including Mission Reserve lands)	21,670 acre-feet	31,880 acre-feet

That the Escondido Mutual Water Company and the Vista Irrigation District recognize in their operations on the San Luis Rey River watershed that the reserved and other rights of the Indian reservations to the foregoing quantities of water from the San Luis Rey River shall at all times be prior and paramount to any and all rights of the Escondido Mutual Water Company and the Vista Irrigation District to the waters of the San Luis Rey River.

Condition 5:

That no water pumped from the Warner groundwater basin shall be transported through Project No. 176 facilities without the prior written agreement of the La Jolla, Rincon, Pala, Pauma, and San Pasqual Bands of Mission Indians, which shall be subject to the approval of the Secretary of the Interior.

Condition 6:

That the Escondido Mutual Water Company and the Vista Irrigation District acknowledge that the La Jolla,

Rincon and San Pasqual Bands of Mission Indians have the right at all times to take from the Escondido Conduit water for agricultural, domestic, recreational or other purposes, or for the purpose of recharging the groundwater basin upon which the Rincon Reservation relies. That the Escondido Mutual Water Company and the Vista Irrigation District will provide water for such purposes at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will release water either at the diversion dam or at the Rincon penstock for the purpose of recharging the Pauma and/or Pala groundwater basins at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will provide such water from any and all sources as constitute a part of the San Luis Rey River system, including storage in Lake Henshaw, in satisfaction of this condition, and that the Indian Bands shall not be limited to the so-called natural flow of the San Luis Rey River. The releases required by this condition include releases from Lake Henshaw to maintain optimum fish flows in the San Luis Rey River above the diversion dam and releases for the maintenance of water quality in the Pala and Pauma groundwater basins. The quantities supplied to the Indian Reservations shall not exceed the quantities specified in Condition No. 4 above except when, in the opinion of the Commissioner of Indian Affairs, larger quantities are required for recharge, water quality, or fishery purposes.

Condition 7:

That the Escondido Mutual Water Company and the Vista Irrigation District will make the releases required by Condition No. 6 until a court of competent jurisdiction rules that the releases need not be made.

Condition 8:

That the Escondido Mutual Water Company and the Vista Irrigation District agree to pay to the La Jolla, Rincon, and San Pasqual Bands of Indians such reasonable annual charges as may be fixed by the Federal Power Commission based on the commercial value of the tribal lands involved for the most profitable purposes for which suitable, including water and power development.

Condition 9:

That the Vista Irrigation District agrees to fulfill its obligations to the Pala Indian Reservation pursuant to section 6 of the June 28, 1922 contract between the United States and William G. Henshaw by drilling a well or wells upstream of the Pauma Narrows so that a flow of 6 cubic feet per second from said well or wells is delivered to the Pala Reservation. Provided, however, that if the Vista Irrigation District chooses to supply water to the Pala Indian Reservation from a source other than the San Luis Rey River, such arrangements may be negotiated between the Vista Irrigation District and the Pala Band of Mission Indians subject to the approval of the Secretary of the Interior.

Condition 10:

That the grant of any right-of-way for Project Nos. 176 and 559 across Indian land shall not preclude agricultural or other use by the Bands of any land included within the rights-of-way that are not actually utilized for the facility itself. Provided, however, that the Bands shall not erect permanent structures or make such other

uses of the land which would interfere with or obstruct the licensee's access to project facilities; and further provided that the licensee or licensees agree to hold harmless the Bands, any members of the Band or other agents, employees, lessees, or assigns for any damages, whatsoever, that may be caused by the maintenance or repair of project facilities on Indian lands by the licensee or licensees.

Condition 11:

That no new physical or operational use shall be made of the La Jolla, Rincon or San Pasqual Indian Reservations in connection with Project No. 176 operations that has not received the prior written approval of the Band, the Interior Department and the Federal Power Commission.

Condition 12:

That the licensee shall cover all of the canal conduit remaining above ground on the San Pasqual Reservation with precast concrete sections and shall remove the unused portion of the concrete canal and flume structures no longer in use and shall restore the land.

Initial Decision by ALJ Issued June 1, 1977 (6 FERC ¶ 63,008).

**UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION**

Escondido Mutual Water Company. Project No. 176.

**Secretary of the Interior Acting in His Capacity as Trustee
for the Rincon, La Jolla, and San Pasqual Bands of Mission
Indians v. Escondido Mutual Water Company and City of
Escondido, California. Docket No. E-7562.**

Vista Irrigation District. Docket No. E-7655.

San Diego Gas & Electric Co. Project No. 599.

**INITIAL DECISION ON CONTESTED APPLICATIONS
FOR RE-LICENSING OF A CANAL PROJECT**

(June 1, 1977)

TABLE OF CONTENTS

	<i>Page</i>
I. THE QUESTION FOR DECISION	000
II. THE SITUS	000
III. THE FOUR DOCKETS AND THEIR CROWDED AGENDA	000
IV. THE LAW'S STANDARDS AND REQUIREMENTS	000
V. THE LAY OF THE LAND, THE FACILITIES, AND THE ENVIRONMENT	000
VI. THE PLAN FOR CONGRESSIONAL TAKEOVER	000
VII. THE INDIANS' PLAN FOR AN IRRIGATION PROGRAM UNDER A "NONPOWER" LICENSE	000
VIII. MUTUAL'S PLAN FOR THE STATUS QUO (AS CHANGED)	000
1. The legal questions	000
2. Economics	000

3.	Annual Charges	000
4.	Conditions to be attached	000
5.	The project amendment.....	000
IX.	SUBSIDIARY PARTIES AND ISSUES.....	000
1.	The City of Escondido.....	000
2.	Vista and Henshaw Dam.....	000
3.	Noncompliance issues and the Interior Department complaint	000
4.	The statutory preference for cities and political subdivisions	000
5.	The San Diego Gas & Electric Company Docket (P-559).....	000
X.	MUTUAL'S WATER CANAL IS NOT A POWER PROJECT NOR IS IT LICENSABLE UNDER THE ACT.....	000
XI.	CONCLUSION AND ORDER.....	000

APPEARANCES

H. Gregory Austin, Reid Peyton Chambers, Harold A. Ranquist, Charles E. O'Connell and Earle D. Goss on behalf of the Secretary of the Interior

Arthur J. Gajarsa on behalf of the San Pasqual Band of Mission Indians

Robert S. Pelcyger, L. Graeme Bell, III, Barbara Fix, Bruce R. Green, Don B. Miller, Barbara E. Karshmer and Terry L. Singleton on behalf of the Rincon, Pala, Pauma, La Jolla Bands of Mission Indians; also Donald L. Scoville for the Pala Band

Robert L. Woods on behalf of the Staff of the Federal Power Commission

Paul D. Engstrand, Jr., Donald R. Lincoln and C. Emerson Duncan, Jr on behalf of the City of Escondido, California, and Escondido Mutual Water Company.

Leroy A. Wright on behalf of Vista Irrigation District

Denis Smaage on behalf of the California Department of
Fish and Game

Vincent P. Master, Jr. on behalf of the San Diego Gas &
Electric Co.

James A. Burke on behalf of Uhllein Hansen

By Administrative Law Judge ELLIS, presiding:

I

THE QUESTION FOR DECISION

The Commission's 50-year license for a California water canal operation, as issued in 1924 (Project No. 176), has now expired, but it continues ad interim, on a year-to-year basis only. Shall it now be re-issued for another 50 years to the original licensee, the Escondido Mutual Water Company (and/or its coparcener, the City of Escondido), or shall it be issued as a nonpower license to the three Indian bands whose land it traverses, or, instead, shall the project be recommended to Congress for takeover by the United States? The three proposals are mutually exclusive, so they were examined, heard, cross-examined and briefed together in a consolidated proceeding. The FPC jurisdiction derives from the Indian reservations utilized; there is no thought of navigable waters, or of interstate commerce, or of the effect on either.

II

THE SITUS

In San Diego County, in the shadow of the Palomar Mountain of the Coastal Range, at the mouth of the Black Canyon and the Bear Canyon, near Deadman Hole, there rises a river called the San Luis Rey, which cuts its way through steep canyons, narrow passes, and then across broad valleys for 65 miles to the Pacific Ocean.

Its natural flow is highly variable, and measurably heavier in winter and spring but quite dry in summer and fall.¹ There is no navigation; it is not navigable at all.

Just above its point of leaving the mountain gorges, the seasonal flow is interrupted by Mutual's small diversion dam, which captures all or nearly all the flow for diversion into an artificial canal, all built by Mutual's predecessors in the 1890's. The canal, an open cement structure² evidently six feet or so wide, miraculously, by gravity alone, carries the water across a mountain range for 13 miles to an artificial lake of 224 acres which is in the next valley, quite out of the San Luis Rey watershed.

This is Lake Wohlford, an important recreational resource for the nearby City of Escondido and for San Diego County. At the end of the lake, which is contained by Mutual's Bear Valley Dam, a 4,230-foot pipe and penstock lead down to a small power house 490 feet below, which is interconnected with the main lines of the San Diego Gas and Electric Co.

About half of the 13-mile canal is through lands which were set aside, mostly in the 1890's, in trust as Indian reservations for three bands of the Mission Indians. This is what brings the case here, under the Federal Power Act, which governs power projects on reservation lands.

III

THE FOUR DOCKETS AND THEIR CROWDED AGENDA

This cause, the Commission's first contested re-licensing case, must be the most thoroughly litigated, or over-litigated proceeding in all history, but also the best briefed on all

¹In the great flood of 1916, the acre-feet flow in January was over 150,000, but in the same month of 1965, the natural flow was one acre foot only.

²Also a number of short tunnels, flumes, and a mile or two of underground piping.

sides. There are four consolidated dockets reaching back over the past seven years, viz.:

E-7562: In 1970, the Secretary of the Interior (acting as trustee for three Indian bands whose reservations are crossed by the canal) filed a formal complaint, alleging numerous violations of Mutual's 1924 license, asking that the transgressions be enjoined and damages be awarded, that the license be revoked, and that the annual charges of \$25 be redetermined and assessed, retroactively. The Commission's Order of April 14, 1971, called for an investigation of the charges, and permitted the bands to intervene by their separate counsel. 45 FPC 569.

Project 176: Early in 1971, Mutual filed its full and formal application for a re-license for the 50 years ensuing after the 1974 expiration. Being well under the new 2,000 horsepower limit, this time it is for a "minor project license." The Commission's hearing order for P-176 and E-7562 issued on July 30, 1971, 46 FPC 253. With the matter still in limine, annual licenses have issued each year since 1974, per section 14 of the Federal Power Act.

By and large, the application is simply to reinstate and renew the former license (as amended about 13 times over the years). However, two significant amendments came in 1975 and 1976, on to remove all but a fraction of a mile of the San Pasqual portion of the canal to a new location on private lands adjoining, and the other from the City of Escondido to become a joint licensee.

E-7655: The Vista investigation. Based on Interior's complaint that another party is involved, and unlawfully so, an investigation was instituted by the July 30, 1971 order, with the Vista Irrigation District as respondent. Vista is a city a little smaller than Escondido, and ten miles to the west, toward the Pacific. It is Vista that owns Henshaw

Dam on the San Luis Rey (9 miles *above* Mutual's diversion point), and about half of the water in the canal is Vista's, under contract of 1922 with Mutual. Vista has a Forest Service license for the dam, but none from the FPC (7T1493). The point of inquiry was Vista's joint usage and control of the canal, but without license. Neither does Vista now seek a license, but they might consider it if on acceptable terms.

The Band's license application: In 1972, speaking through two motions and six supplemental letters, the five Indian bands filed their joint competing application for a "nonpower license" under Section 15(b) of the Federal Power Act. Interior joined in, announcing it would be responsible for supervision if the license be granted.

Federal takeover recommended: Also in 1972, the Secretary of the Interior formally recommended the necessary steps for recapture of the project and its takeover by the United States, looking toward a Commission recommendation to that effect to the Congress. Interior's plan is a possible alternative to the non-power license, and contemplates similar tribal operation. It is a part of this case, see 48 FPC 1192.

Project 559: The only non-controversial portion of this over-all case is a 1974 application by the San Diego Gas and Electric Company for a license for its two-mile power line connecting the small power house on the Rincon reservation with San Diego's primary lines nearby (already licensed elsewhere). A related matter, an authorization to abandon an older and now unused line into Rincon, is the subject of a separate initial decision now *in processu*.

Interventions: Two other parties have intervened—the State of California Department of Fish and Game, and Ms. P. U. Hansen, a ranch-owner on the river, below the Pala Reservation.

Hearings: After a pretrial in 1971, the hearings convened in 1973 in California, half the sessions in Escondido and half in the tribal meeting hall at Pala. The hearing reconvened in Washington in November 1973 and again in 1974. At this point it developed that full treatment should be accorded under the Environmental Protection Act (minor license projects generally being exempt). So the Commission's Order of November 19, 1973, called for an environmental impact statement, which was finally completed 21 months later. Hearings on this phase followed in 1975 in California and in 1976 in Washington.

Through 1976 successive briefs were received, all of them of most unusual excellence and thoroughness, but (except for one) none of them suffers abbreviation to thwart the demands of definitive truth. They total [sic] pages from the three sides.

The record: The 11,149-page transcript of the cross-examination of 78 witnesses is only a moiety of the record because all prepared testimony was treated, for economy, as exhibits; there are nearly 600 all told, some of them many pages long. The record and hearings would have perhaps doubled in extent had not all parties collaborated to provide an eight-volume stipulation of background facts and historical documents, going back to the 1880's, all of which were admitted as Ex. A-1 and its 308 attachments.

The viewing: Nearly as useful as the written record were the several inspections of the entire complex, from Lake Henshaw down to Bear Valley powerhouse. The trips occupied three days, including a walking tour of the 13-mile canal. Participants included this forum, all of the parties' counsel, Mutual's helpful staff, some witnesses and a number of Band members, including the "Captains" of three of the Bands. Against the ever conceivability that today's initial decision might possibly in due course, become the

subject of Commission or court review, the suggestion is here recorded that any reviewing authority at any level, would be well served by undertaking at least some on-site inspection of the canal, the dams and the reservations. Failing this, there might be for perusal the many fine pictures which are in the official record (see exhibits M-3, M-38, M-48, M-75, M-207 and S-60). A few of them are here reproduced and inserted.



*Section of canal above flume #5
and wolfe trap on San Pasqual*

*Typical section near old Indian turnout
on Government land*



DIVERSION DAM AND CARETAKER'S COTTAGE



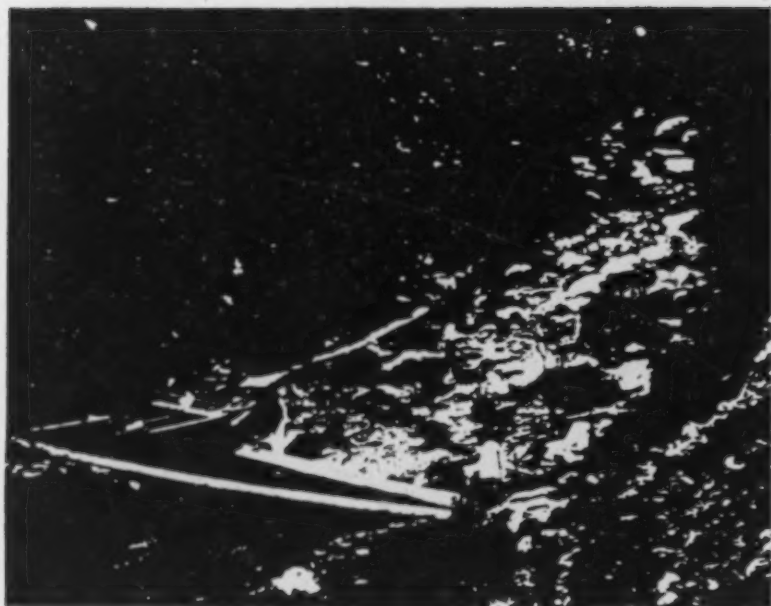


Figure 1-3, a and b. Above, a, Project intake diverting San Luis Rey River to Escondido Canal. Below, b, Streambed immediately below diversion dam and canal intake.



IV

THE LAW'S STANDARDS AND REQUIREMENTS

In this omnibus proceeding, six separate licensing decisions are called for, namely —

- (a) the Escondido Mutual Water Company wants a new license, virtually a renewal of the license they received in 1924, which expired in 1974. The City of Escondido joins in, endorses Mutual's application, and wants to be a joint licensee.
- (b) The Department of the Interior wants the Commission to recommend to Congress Federal takeover of the entire project.
- (c) In the alternative, the Department of the Interior and the several Indian Bands want a "nonpower license" to the Bands under Section 15(b). Note that there is only one San Luis Rey, and favorable action upon any one of these three choices precludes affirmative action on both of the others.
- (d) The Vista Irrigation District's license status is to be determined, either to the effect that no license is required or appropriate or, in the alternative, that Vista may not continue its unlicensed joint use of the canal, so must apply for a license, in default of which its water could not go down the canal.
- (e) The Staff wants any license issued as above to be broadened to include Vista's Lake Henshaw and Henshaw Dam.
- (f) The connecting electric lines of the San Diego Gas and Electric Company which lead into the small power generator on the Rincon land have to be re-licensed, if the rest of the project is. (This is P-559.)

To determine the agenda for these six separate rulings, one turns to the Federal Power Act, Part I being the 1935

re-enactment of what was called the Federal Water Power Act of 1920, its 28 sections comprising 16 USC 792-823. The statute makes it clear that application no. (b), the Federal takeover, must be examined first because if the Commission shall conclude to recommend Federal takeover, then it is not supposed to approve any application at all. The rules about takeover are found in Section 7(c) and in Section 14(a). In Chapter VI below, these and other sections are considered, together with the Department's recommendation,¹ and the conclusion is there stated that the Commission should not recommend Congressional takeover.

Next in order is application no. (c) above, the Bands' program for a nonpower license, since that issue is supposed to be decided "in issuing any licenses under this section except an annual license." The controlling language of the nonpower license provision is in Section 15(b), as follows:

"whenever it [the Commission] finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licenses project should no longer be used or adapted for use for power purposes

In that event, the Commission may license all or part of the project works for nonpower use, but on the condition that the new licensee pay in Mutual's "net investment," to the same extent as would be required to be paid by the United States in the case of takeover. If the nonpower license issues, it is to be a temporary one, evidently meaning, as it goes on to say, that as soon as another state or Federal agency is ready to assume regulatory supervision, then the non-

¹But note that if a license should issue contrary to that recommendation, the Department of Interior may move to stay the effective date of the Order issuing the license for two years after its date, see Section 14(b).

power license shall terminate. This subject is taken up in Chapter VII below, where it is concluded that, under the circumstances, a nonpower license may not issue.

Next in order is to consider application no. (a), Mutual's application for a new license, in which the City of Escondido joins. Several sections govern this matter and they must all be read together, for Section 14(b) specifies that —

“ . . . the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 15.”

Turning to Section 15, one learns that the Commission, under authority of *that* section, may issue a new license either to the original licensee or to a new licensee —

“upon such terms and conditions as may be authorized or required under the then existing laws and regulations.”

Scattered through the law are many conditions which, to the extent so incorporated, must be found or imposed to validate a new license, such as —

(i) If it is a new (and different) licensee, he must pay in the old licensee's “net investment” and assume its contracts as the United States would be required to do in the event of Federal takeover. S. 15(a).

(ii) In issuing new licenses under Section 15, the Commission “shall” give preference to applications by states and municipalities, provided their plans are deemed “equally well adapted . . . to conserve and utilize in the public interest the water resources of the region. . . .” S. 7(a).

(iii) If the two competing applicants are not municipalities or states, the winner is to be the applicant whose plans are found to be “best adapted to develop, conserve, and utilize in the public interest the water resources of the region . . .” (if it is clear the applicant can carry out such

plans). S. 7(a).

(iv) Per Section 10, all licenses issued under the Federal Water Power Act "shall be on the following conditions" —

"That the project adopted, including the maps, plans and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes. . . ."

(v) The licensee must pay reasonable annual charges in an amount to be fixed, which, in the case of tribal lands embraced within an Indian reservation, shall include, subject to the approval of the Indian tribe, a reasonable annual charge for the use of the land. (Minor projects may be without charges "except on tribal lands within Indian reservations.") S. 10(e).

(vi) The license must be conditioned upon its acceptance by the licensee in all its terms, including "such further conditions, if any, as the Commission shall prescribe in conformity with this Act. . . ." (S. 6.)

Thus, the Commission's authority to act on the three applications is complete and definitive in the sections referred to, meaning Section 6, Section 7, Section 10, Section 14 and Section 15. There is also another Section, number 4(e), which gives the Commission a parallel authority to issue licenses, or it may be regarded as one incorporated in all the others.

There is a fair doubt as to what extent Section 4's provisions should be or were intended to be applied, or could be thought appropriate, to the relicensing of a project already long since licensed and built, as distinguished from the more normal case of a proposal for a license for a water devel-

opment not yet even begun. On the one hand, it is most earnestly contended that by its own language and by its incorporation in Section 15, as recited above, Section 4's many provisions are as fully applicable here as in any other. Equally earnestly it is pointed out that Section 4 is designed for new projects, not for relicensing, and that where Section 4 merely "authorizes and empowers" the Commission to take certain action — namely, to issue licenses — that authority of Section 4 is not applicable here, because the action to be taken is already authorized and required by Section 15, as above quoted.

Anyway, as written, Section 4 gives this authority to the Commission (whether or not limiting or defining the authority given by Section 15) to license dams and other project works "upon any part of the public lands and reservations of the United States" if the applicant's purpose in constructing, operating or maintaining the works is for the improvement of navigation, the development of power or to utilize surplus water power from a Government dam. All of this is from Section 4(e), and to the extent that it applies here, there is for consideration a double proviso reading as follows:

"Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the Department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."

Thus, in summary, it is undoubted that a license may issue only if the licensee accepts such further conditions as the Commission shall prescribe (Section 6); the applicant

must be the one whose plans are best adapted to develop, conserve and utilize in the public interest the water resources of the region (Section 7); it must be best adapted to a comprehensive plan for improving or developing the waterway for water power and other beneficial public uses, including recreation (Section 10(a)); and finally, the licensee must pay the annual charges to be fixed, subject to the approval of the tribe (Section 10(e)).

However, all of the foregoing conditions, provisions and requirements are subject to waiver in the Commission's discretion if deemed to be in the public interest, *except* the annual charge within Indian reservations may not be waived — all of this because it is definitely a minor project, see Section 10(i).

So, *all* of these provisions must be taken, read together, and at least considered in passing on Mutual's application.

Next, in connection with Vista's case (d), it must be determined whether it is unlawful for Vista "for the purpose of developing electric power" to maintain its dam partly on the public lands or to jointly operate the water conduit across the reservations, all without any FPC license at all, unless it be found to be authorized by a permit or right-of-way granted prior to June 10, 1920 — for all of which, see Section 23(b). (Not at all, says Vista, because this sentence came along only in 1935, and it was not meant to cover dams already long since built and in use.)

If Vista shall be found to be in an unlawful activity, as there recited, in that event "the Attorney-General may, on request of the Commission or of the Secretary of the Army" institute court action for injunction, mandamus or other process as may be indicated, for which purpose the District Courts are given jurisdiction.

So, first one decides on Congressional takeover, then the Bands' plan for a nonpower license, then the plan of Mutual

and Escondido for a renewal of the license (and San Diego's related power line project); and finally, the status of Vista and Henshaw Dam. To apply these various standards, provisions and requirements of the law requires a thorough understanding of the nature of the area, the economic effects, the social effects, and the environmental effects of all of the several programs, and all of that is the subject of the next chapter.

V

THE LAY OF THE LAND, THE FACILITIES, AND THE ENVIRONMENT¹

A. *Location and Functions of the Existing Project*

Project 176 is located on the San Luis Rey River and Escondido Creek. The project begins at a diversion dam constructed across the San Luis Rey River about 9 miles downstream from Lake Henshaw Dam, the only significant impoundment on the river.² From the diversion dam, the project's 13.5-mile long Escondido Canal runs southwestwardly to Lake Wohlford on Escondido Creek, the project's terminal storage reservoir. In its course the project canal traverses the La Jolla, Rincon and San Pasqual Indian Reservations. Water stored in Lake Henshaw is conveyed through project facilities to users in the communities of Escondido and Vista.

The project conveys to Escondido an annual average amount of 2,700 acre-feet of water developed by Mutual's appropriations on the San Luis Rey River. In addition, project facilities convey to Escondido an average annual amount

¹This chapter is taken, in substantial part, from the Staff's Final Environment Impact Statement, Exh. No. S-60.

²The Lake Henshaw facilities, including a reservoir and well field operated by Vista Irrigation, are not part of Project No. 176 nor presently under the jurisdiction of the Commission.

of 4,100 acre-feet of water purchased by Mutual from water developed at Lake Henshaw, together with 7,800 acre-feet per year of Vista Irrigation's water conveyed through the project facilities under contractual arrangements between Vista Irrigation and Mutual. These water flows, totalling 14,600 acre-feet per average year, serve a major portion of the municipal and irrigation needs of the two communities. A certain amount of water is also delivered under contract to the Rincon Indian Reservation for irrigation and ground water recharge.

A by-product of the water project is the generation of hydroelectric power at the Rincon and Bear Valley power plants and recreation at Lake Wohlford. The two power plants produce on the order of 4 million kilowatt-hours of energy per year, with the annual amounts varying historically from 1.0 to 7.3 million kilowatt-hours. Total installed capacity is 760 Kw. Since 1954, the major portion of the power generated is integrated into the overall supply of San Diego Gas & Electric Company. The remainder of the power is supplied to the Rincon Indians pursuant to a 1914 contract between the United States and Mutual. Recreational usage at Lake Wohlford includes boating, fishing and picnicking. Recreational use on project lands is currently estimated to be in the range of 135,000 visitor-days per year. The San Diego County Department of Parks and Recreation has prepared plans to enhance the recreational benefits of the Lake Wohlford area.

B. *History*

In 1895 the Escondido Irrigation District, predecessor of Mutual, began the diversion of water from the San Luis Rey River at the Escondido Intake and the conveyance of the water to the Escondido area. Terminal storage was provided at Bear Valley Reservoir, a regulatory reservoir on

Escondido Creek, now known as Lake Wohlford. In 1905, Mutual was formed to take over the operations and assets of the bankrupt Escondido Irrigation District. The City of Escondido now owns or holds proxies to approximately 90% of Mutual's stock. Non-project facilities of Mutual are currently operated by the City as part of an integrated water system.

Opportunity for power development was early recognized and the small Rincon and Bear Valley hydroelectric plants were constructed between 1914 and 1916. While recreational use of Lake Wohlford also occurred early in the project life, major recreational development was not undertaken until the early 1930's when the fishery was expanded and became one of the finest inland fishing spots in San Diego County.

During the early 1920's, San Diego County Water Company constructed Henshaw Dam on the headwaters of the San Luis Rey River above the Escondido Canal intake. At the elevation of the spillway, the dam could impound a reservoir of 194,000 acre-feet storage capacity.¹ Pursuant to various contracts between Mutual and San Diego County Water Company, its predecessors and successors, certain waters are released from Lake Henshaw in satisfaction of Mutual's appropriative rights; in addition, a portion of the water developed by Lake Henshaw is sold to Mutual. The contracts also grant to San Diego Water Company the right to convey additional water, over and above that sold to Mutual, through Escondido Canal and into Lake Wohlford. The water so conveyed is delivered to Vista Irrigation, the customer for virtually all of the water developed at Lake Henshaw over and above that purchased by Mutual.

¹Storage is currently limited to an amount of 18,000 acre-feet, under regulation by the California Division of Safety of Dams.

In the late 1920's, in order to accommodate the conveyance of the additional water made available by Lake Henshaw, the Escondido Canal was enlarged and Bear Valley Dam, which impounds Lake Wohlford, was raised.

In 1946, Vista Irrigation acquired San Diego Water Company and thus succeeded to the rights and obligations appurtenant to Lake Henshaw. A severe drought beginning in the late 1940's prompted Vista Irrigation in the 1950's to construct a well field to extract water from the ground water basin lying above Lake Henshaw in order to maintain the supply of water to Escondido and Vista. The water so extracted is conveyed to Lake Henshaw and then delivered to the two communities in the same manner as run-off into the reservoir. The waters are divided between Mutual and Vista Irrigation in accordance with contracts between the two entities.

C. Precis of the Pending Proposals

Mutual seeks to continue operating Project 176, as in the past, primarily as an inter-basin water transfer system, diverting natural, pumped and stored streamflow from the San Luis Rey River, across a natural drainage divide, for utilization by water users in Escondido and Vista primarily for irrigation and domestic consumption. This diversion has averaged about 14,600 acre-feet per year since 1925. A certain amount of water would continue to be delivered to the Rincon Indian Reservation for irrigation and ground water recharge. In the course of delivery, Mutual would continue the operation of the two small hydroelectric facilities that have been in operation since 1916, reconditioning them if necessary. Expanded recreational development of the Lake Wohlford area has been proposed which would result in an estimated 220,000 visitor-days per year by 1984.

The Bands propose a plan that would eventually end the transfer of present project water to Escondido and Vista. Their nonpower license would have as its principle objective the delivery of all or most of the present project water to the lands of the La Jolla, Rincon and San Pasqual Reservations, and to the groundwater basins of the Pauma and Pala Basins for pumping recovery by the Bands. Project water is defined as that water which is diverted, transported, stored or utilized in the project works, regardless of ownership or ultimate use. These waters would be used by the Bands for agricultural and domestic purposes. The two project power plants would not be reconditioned, but would be operated only until major breakdowns put them out of service. The generating equipment would then be dismantled or salvaged while the related water passages and conduits would be incorporated into the proposed water deliver system.

The Bands propose a phased decrease in project water delivered to Lake Wohlford (and hence to Escondido and Vista) and a corresponding increase in project water delivered for Indian use over a 50-year period. During the first years of operation the Bands propose that most of the water would continue to be delivered to the present users at a negotiated price, or would be sold to other users in the San Luis Rey River Basin. Revenues from the water sales would be used to support irrigation construction and development activity on Indian lands. Projected irrigation development would be at the rate of about 200 new acres per year, requiring a rate of increase of water delivery of about 300 acre-feet per year. At the end of 50 years, essentially all the project water would be in use on Indian lands, except for a residual delivery to Lake Wohlford to make up for evaporation and seepage losses and small amounts that would be delivered to the San Pasqual Reservation. The Bands

have indicated that releases of water from and inflow of water to Lake Wohlford would be necessary to prevent an excessive build-up of dissolved solids.

Interior's proposal for takeover differs very little from the Bands' nonpower application. Under Interior's proposal, the Bureau of Indian Affairs would conduct most project-related work with the personnel from that agency. Both Interior and the Bands are supporting the other's plan as the best alternative to their own.¹

Should takeover occur or a nonpower license be issued, Lake Wohlford would continue to be used for recreational purposes. In addition, the Bands would continue to provide additional out-door recreational opportunities outside the project boundary, such as trout fishing, camping and picnicking along the San Luis Rey River on the La Jolla Reservation.² Fishery programs would be consistent with the primary purpose of gradual development of 10,500 acres of irrigated reservation lands over a 50-year period.

The proposals of the Bands and Interior may require the construction of additional major water facilities by Mutual and Vista Irrigation to maintain the present decree of system reliability, and would also result in the people in the vicinities of Escondido and Vista using alternative water supplies at higher prices and, initially, of somewhat lower quality. The major land use change would be the gradual conversion of 10,500 acres into agricultural production consisting mostly of avocados and citrus crops.

¹Should a new power license be issued to Mutual, Bands and Interior recommend that Lake Henshaw be included in the project boundaries.

²The present annual visitor use on the reservation is estimated at 27,000 visitor-days.

D. Detail of the Facilities and Land Use, Existing and Proposed Project Works:

The licensed project presently consists of the following facilities (bear in mind that Henshaw Dam and the upper 9 miles of the river are not included in the present project).

- (1) A concrete gravity diversion dam about 16 feet high with a 112-foot crest length, on the San Luis Rey River and within the La Jolla Reservation, which diverts water at an elevation of about 1,780 feet (USGS datum);
- (2) An intake structure and conveyance system 13.5 miles long, consisting of tunnels, canals, flumes, and a siphon, conveying the flow into Bear Valley Creek which discharges into Lake Wohlford;
- (3) Lake Wohlford Dam on Escondido Creek, a combination rockfill and hydraulic-fill structure with maximum height of 100 feet creating Lake Wohlford Reservoir having a maximum storage capacity of 6,943 acre-feet at an elevation of 1,475 feet and a surface area of 224 acres;
- (4) Outlet works connected to a pipeline 3,400 feet long and penstock 830 feet long extending to the Bear Valley powerhouse, containing 3 generating units with a total capacity of 520 kw, operating under a head of 490 feet;
- (5) The Rincon powerhouse located on the Rincon Reservation which utilizes water from the conduit at a point 6 miles below the San Luis Rey River diversion dam where the flow is diverted through a 2,100-foot-long penstock extending to the powerhouse, containing 2 generating units totaling 240 kw capacity, operating under a head of 820 feet;

- (6) Two operators' cottages, one at the Rincon powerhouse and one at the diversion dam (the latter is situated immediately outside the licensed boundaries);
- (7) Telephone lines, powerlines, access roads and trails necessary to operate and maintain project works; and
- (8) Other facilities and interests appurtenant to the project.

Although, as initially licensed, the project included transmission lines between the Rincon and Bear Valley power plants, these lines have not been utilized since 1954 when Mutual sold its power distribution system to San Diego Gas and Electric Company. Mutual proposes to remove the steel towers of the old transmission line when permission to do so is granted under its pending application with the Commission.

The State of California, Division of Safety of Dams has recently restricted the normal storage level in Lake Wohlford to an elevation of 1,465 feet (mean sea level), which corresponds to a storage capacity of 4,019 acre-feet. This limitation is expected to remain in effect pending a stability study of the dam's hydraulic earth fill during seismic occurrences.

Mutual proposes to construct a 48 inch pipeline, approximately 8,000 feet in length, to replace approximately 12,000 feet of open canal through the reservation. Under the alignment described by Mutual, the northerly 1,000 to 2,000 feet of canal would remain on the reservation (which occupies relatively steep hillside lands) and would be fenced. From this point the proposed pipeline would extend to a generally westerly direction across the Reservation lands and private lands to Lake Wohlford Road. The pipeline would then

extend southerly to a connection with the existing pipeline north of Lake Wohlford. Upon termination and abandonment of the open canal through the Reservation, the area would be restored to pre-canal conditions as far as practicable.

Project lands presently occupy approximately 1,200 acres and include rights-of-way of varying widths along the canal, small parcels surrounding the appurtenant structures such as the diversion dam and the Rincon power plant and a large area at Lake Wohlford. In addition, access roads and telephone lines are provided to the project features. The project lands at Lake Wohlford occupy 843 acres of which 662 acres are held in fee by Mutual and 181 acres are U.S. lands under the Supervision of Interior's Bureau of Land Management.¹ The canal, located within a 100-foot right-of-way, occupies 356 acres including appurtenances. Of these acres, 225 are on U.S. lands under Interior, 87 are on Indian lands (La Jolla — 25; Rincon — 26; and San Pasqual — 36),² and 44 are in easements across private lands. In the event Mutual constructs its proposed pipeline to replace the open canal through the San Pasqual Reservation, the right-of-way area on that reservation would be greatly reduced.

Mutual's present and proposed recreational developments for Project 176 are around Lake Wohlford. Existing facilities include a boat launching ramp; docks for up to 60 boats; an equipment building; 103 rental boats and 25 motors available to the public; boat washing facilities; a 2,400 square foot building for boats; 18 pairs of comfort stations (chemical type); trash receptacles; a picnic area with 8 tables; parking facilities for about 250 automobiles; boat trailer

¹The lake itself, when full, occupies about 224 acres.

²Total reservation acreage figures are: La Jolla — 8,332; Rincon — 4,057; San Pasqual — 1,380; Pala — 7,736; and Pauma (including Yuima) — 250.

parking spaces near the boat launching area; access roads; appropriate signs; and safety devices such as buoys and a log boom used to keep boats away from dangerous areas near the outlet and spillway.

Nonproject facilities around Lake Wohlford within the project boundaries include a shooting range leased to a local gun club, a general store and restaurant, 135 permanent trailer spaces, cabins and houses available for rent, a resort lodge on the south side of the lake providing picnicking and camping. These facilities are leased to the entrepreneur by Mutual and lessees are subject to conditions indicated in the lease.

Principal recreational uses of Lake Wohlford are boating and fishing. Swimming is not permitted because the lake is used as a public water supply. Section 7630 of Title 17 of the California Administrative Code specifically excludes activities involving bodily contact with domestic water supplies by persons or animals.

Mutual proposes a plan for full public use of suitable project waters and lands for recreation. Under its short-range plan, Mutual proposes to develop a year-round recreation program at Lake Wohlford which presently is open 6 months of the year. The feasibility of keeping the lake open for year round fishing will be studied. Approximately 50 campsites would be developed near the east end of the lake and additional picnic sites would be developed. A conservation area for school children to use as an outdoor laboratory is contemplated. Also, a swimming program is planned once a water purification plant is installed by Escondido and Vista Irrigation District and proper authority is given. However, as indicated above, California State Health Laws prohibit body contact recreational uses in domestic water supplies, regardless of the treatment method.

Long-range recreational plans include constructing a lodge, developing equestrian trails, improving sanitary facilities at the recreation sites, improving dock facilities, and providing additional boat storage.

Under the Bands' proposal the recreational development at Lake Wohlford would be similar to Mutual's Plan, except the Bands propose to maintain a more stable reservoir level. However, this would depend on the amount of water retained within the San Luis Rey River Basin and the amount of water sold to users out of the basin by the Bands.

The Bands propose to optimize the recreational potential of the La Jolla Reservation by: (1) changing the releases from Lake Henshaw to improve the fisheries of the San Luis Rey River; (2) increasing the length of the fishing season; (3) completing backpack camping facilities along the La Jolla campground; and (5) initiating campground expansion at a 10-acre site upstream from the present campground.

Although Lake Henshaw is not a part of Project 176, it does provide a variety of recreational facilities and uses. Facilities are available for fishing, boating, cabin rental, and include a restaurant and food store. A Regional Park Implementation Study prepared for San Diego County recommends that both Lakes Wohlford and Henshaw should become regional parks between 1972 and 1990.

The Bands and Interior propose to use the project works in a manner quite different from Mutual's operation. The two hydroelectric plants would be retired from service at the first major breakdown, with no attempt to recondition them for continuing service. There would be no construction of a pipeline to replace the open canal on the San Pasqual Reservation because the canal would be used to implement the Bands' irrigation plan; however, the Bands indicate in their Exhibit W that the canal would be covered, possibly

with precast concrete slabs. However, the Bands have not officially filed an amended application with the Commission to allow the canal to be covered. The Bands also propose a smaller right-of-way width for the canal. The Bands report in Exhibit I-29 that they would recommend a fish screen be installed at the diversion dam to prevent fish passage into the canal. No details of the proposed screen or its costs have been provided. Finally, the Bands and Interior propose that Lake Henshaw, the storage reservoir upstream from the project's diversion dam, be included in any new power license issued for Project 176. Lake Henshaw is described in more detail at the end of this section.

Additional nonproject facilities are planned to be constructed to convey water primarily for agricultural purposes, to areas of future development, which are not serviceable from the existing project works.

The principal nonproject facilities would consist of diversion works, pipelines and laterals, wells, and pumping plants. The proposed irrigation facilities for each of the six reservations are briefly described below.

La Jolla: The Escondido Canal traverses irrigable lands in the southwestern corner of the 8,300 acre La Jolla Reservation, the largest of the 5 reservations. Diversion works and controls would be built at the canal side at four locations. Both gravity and pumping distribution methods would be used. Lands on the north side of the San Luis Rey River would be supplied from wells.

About 2 miles of pipeline from 8-inch to 10-inch diameter would be required to supply water to the proposed agricultural developments on the La Jolla Reservation. By the year 2000, 300 acres of land are planned for irrigation on this reservation. Approximately 6,700 acres of this reservation are nonirrigable.

Rincon: After 25 years of the Bands' plan, about 2,000 acres of the 4,000-acre Rincon Reservation would be under irrigation.

Lands on the north side of the river would be supplied by a system of six wells from the groundwater of the Pauma basin underlying the reservation. By the year 2000, the total water requirement in the peak demand month is estimated to be 17 cfs. The proposed plan contemplates about 5 miles of pipeline ranging from 10-inch to 16-inch diameters required to transmit water to the north side of the Rincon Reservation.

Lands on the south side of the river would be irrigated by surface delivery of water from the canal by use of the existing penstock of the Rincon powerplant. The penstock might be extended across the valley floor to provide surface delivery of irrigation water to lands on the west side of the reservation. The penstock extension would be about 1 mile long and have a diameter of 18 inches. The main pipeline would be about 11 miles long and pipe diameters would vary from 8 to 18 inches.

San Pasqual: The San Pasqual Reservation is located generally on the divide between the San Luis Rey River and the Escondido Creek watersheds and occupies 1,380 acres with a planned irrigable land area of 720 acres by the year 2000. Lands designated for development would receive surface delivery of water from the canal. About 5 miles of main pipeline would be required to deliver water to agricultural lands. A pumping plant would be required together with sump pumps in the conveyance system.

Pala: The Pala Reservation is located some 8 miles downriver from the Rincon Reservation on the San Luis Rey River and occupies approximately 7,736 acres, making it the second largest of the 5 reservations. By the year 2000,

the Bands plan to irrigate 1,780 acres within this reservation.

The peak irrigation demand for lands in the northern portion of the reservation is estimated to be 18 cfs. The supply would come from 6 wells at the eastern end of the main conveyance system. A manifold collection system along the San Luis Rey River and proposed branch lines to provide water to agricultural lands are proposed. About 11 miles of pipeline ranging from 8 to 24 inches in diameter would be required.

Agricultural lands south of the San Luis Rey River would be irrigated from 3 wells expected to yield about 3 cfs each. Three miles of pipeline with diameters varying from 8 to 12 inches would be required to provide water for irrigation.

Pauma and Yuima: The Pauma Reservation (which includes two Yuima locations) is situated a short distance east of Pala and north of Rincon. The Pauma Reservation encompasses 250 acres including the Yuima Reservation. By the year 2,000 it is planned to irrigate 200 acres.

The Yuima Reservation is presently included in the Metropolitan Water District of Southern California, San Diego Water Authority and Yuima Municipal Water District; thus imported water is available to this reservation.

Water for irrigation would come from 4 wells, each with a capacity of about 2 cfs. Each well would feed directly into the supply line for distribution. The total length of the main pipeline in the Pauma Reservation and the 2 tracts of the Yuima location would be less than 2 miles. Pipe diameters would range from 8 to 12 inches. The Pauma Reservation historically has been served by surface water diversion from Pauma Creek, a tributary of the San Luis Rey River.

Under the Bands' application, project lands would occupy a total of about 1046 acres, of which 843 would be at Lake

Wohlford (as presently and under Mutual's proposal) and about 203 would occupy the rights-of-way for the Escondido Canal. The proposed reduction in the latter from present project acreage would result from decreasing right-of-way widths in certain segments totalling nearly 12.6 miles along the conduit.

Lake Henshaw: Lake Henshaw, a nonproject reservoir, located on San Luis Rey River 9 miles upstream from the Project 176 diversion works, is owned and operated by Vista Irrigation District, which was organized in 1923. The first water from Lake Henshaw was delivered to the District in February, 1926.

The maximum storage capacity of the reservoir at an elevation of 2,727 feet (USGS datum) is approximately 194,000 acre-feet; however, the California Department of Water Resources, Division of Safety of Dams, recently restricted storage to an elevation of 2,670 feet (USGS datum), or to about 18,000 acre-feet for safety reasons based on recent seismic activity in Southern California. The reservoir surface area is about 5,900 acres at maximum elevation, and about 1,400 acres at the lower.

Henshaw Dam is a hydraulic-fill type, about 123 feet high at maximum section, and is equipped with an uncontrolled concrete spillway at the right abutment at an elevation of 2,727 feet and a low level outlet tunnel through the left abutment of the main dam.

Lake Henshaw completely controls the runoff from 206 square miles of a drainage area of a total of 238 square miles above the Project 176 diversion dam. Because of the reservoir's large size compared to natural streamflow, Henshaw Dam has never passed floodwaters over its spillway. In addition to controlling surface runoff, Lake Henshaw also stores water pumped from the groundwater basin of the

Warner Ranch area upstream from Henshaw Dam. The pumped water is divided between Vista Irrigation District and Mutual in accordance with contracts between the two parties.

The Staff estimates that about 77 percent of the water arriving at the Project 176 diversion dam originates above Henshaw Dam. If Lake Henshaw did not exist, at least 48 percent of the natural flow at the diversion dam would spill past the project canal.

The spillway of Henshaw Dam occupies 1.91 acres of land within the Cleveland National Forest. In addition, in 1943 when Lake Henshaw had its maximum actual water storage of about 180,000 acre-feet, another 7.5 acres of Cleveland National Forest land were inundated by the reservoir.

Vista Irrigation has not applied to the Federal Power Commission for a license for Henshaw Dam and reservoir. The Bands and Interior propose that Henshaw facilities be included in any new power license issued for Project 176.

The San Diego County Regional Parks Implementation Study, April 1972, recommends that under a long-term development program Lake Henshaw become a regional park by 1990 in cooperation with the County and Vista Irrigation and the U.S. Forest Service.

Transmission Facilities: Transmission facilities include three 100 kVA, 2.4/11 kV step-up transformers, switches, and about 100 feet of 12-kV line at Rincon powerhouse; Bear Valley powerhouse has three 150 kVA and three 100 kVA, 2.4/11 kV step-up transformers, switches, and approximately 20 feet of 12-kV line.

San Diego Gas and Electric Company's 12-kV distribution circuit No. 216 interconnects with Mutual's 12-kV lines at both the Rincon and Bear Valley powerhouses, but that

circuit is not within the project boundary. A portion (2.42 miles) of the 12-kV circuit No. 216, from San Diego Gas and Electric Company's Rincon substation to the interconnection at Rincon powerhouse, is in FPC Project No. 559 and is the subject of a relicensing application filed by San Diego Gas and Electric Company.

An abandoned 11-kV steel tower transmission line which extended 7,185 miles from the Rincon powerhouse to the Bear Valley powerhouse was in the original project. Some of the steel towers are standing with wires and insulators intact; others are down, some with insulators and wires removed. Neither pending application for license would include this line or its right-of-way in the project.

An application was filed with the Commission on January 31, 1967, by the Licensee, for amending the license to abandon the 12 kV transmission line between Rincon and Bear Valley powerplants, and remove all steel towers and fixtures. No action has been taken to date.

E. Water Operations

Operation of the Escondido Project is substantially dependent upon water released from Lake Henshaw [sic]. The conduit receives about 23 percent of its water from the drainage area between Lake Henshaw and the project diversion. The remainder originates above Henshaw Dam.

Lake Henshaw has a maximum capacity of 194,323 acre-feet, but, as noted above, the California Department of Water Resources, Division of Safety of Dams, has restricted storage to an elevation of 2,670 feet (USGS datum), or approximately 18,000 acre-feet for safety reasons. Vista Irrigation District is considering rehabilitation of Lake Henshaw Dam to provide for a safe storage capacity of 50,000 acre-feet.

Water stored in Lake Henshaw is subject to water rights existing prior to construction of the Lake Henshaw Dam. These rights are presently the subject of litigation in the Federal District Court in San Diego.

Water enters Lake Henshaw by rainfall, surface runoff, and pumping from the Warner's Ranch basin near the reservoir. The inflow into Lake Henshaw is computed by Vista to determine the water available to the Rincon Indians. When the inflow exceeds 6 cfs a mathematical formula is used. If the flow is 6 cfs or less, a portable weir is installed on the west fork of the San Luis Rey River for a more accurate determination of the flow to which the Rincon Indians are entitled.

During the rainy season the natural flow below Henshaw Dam is usually adequate to meet the Rincon Indians water entitlement of 6 cfs; however, during some drier years the natural flow must be augmented by water release from Lake Henshaw. The water for the Rincon Indians and Mutual is measured at the intake to the Escondido Canal. When the natural flow below Lake Henshaw is less than the required flow to meet the entitlement, the natural inflow to Lake Henshaw is calculated. Water is then released from Lake Henshaw up to the amount of the entitlement. Once the natural inflow to Lake Henshaw stops, no additional water is released for the Rincon Indians. Because of difficulties inherent in computing "natural flow" above Henshaw Dam, Vista has been using the "Powell Formula," since the spring of 1974. The Powell Formula recognizes some additional natural flow above Henshaw that cannot be calculated on a daily basis, but must be estimated on a seasonal basis. This estimate is ready each spring and the additional water, if any, is delivered to the Rincon Band on their demand during the irrigation season. Mutual has a contract with Vista Irrigation District for the purchase of water from Lake

Henshaw.

Some water — 10% on the average — is periodically diverted from the project canal into the penstock of the Rincon powerhouse. This powerhouse operates from fall to early summer depending on the amount of natural flow in the San Luis Rey River. All of the water going through the penstock is delivered to the Rincon Indian Reservation via the Indian irrigation system, or it is allowed to flow directly into the San Luis Rey riverbed to recharge the ground water basin.

When natural flow of the San Luis Rey River drops below 3 cfs in early summer, the Rincon powerplant is shut down. The remaining flow of the Indian water right is diverted around the powerhouse and delivered to the Rincon Reservation.

The water that is transported in the canal past the intake to the Rincon penstock is delivered to Lake Wohlford. Vista has storage rights in Lake Wohlford by contract with Mutual and makes substantial use of that storage. Natural inflow contributes about 1,120 acre-feet annually into Lake Wohlford.

Water is released from Lake Wohlford via a pipeline leading to two penstocks, one owned by Vista and the other by Mutual. Water released from Lake Wohlford can be used to generate power at the Bear Valley powerhouse, or it can be bypassed into either Mutual's or Vista's water system without generating power. From the Bear Valley site water is transported to Mutual's and Vista's service areas.

The Escondido Canal is closed for annual maintenance from mid-October to the end of December. During this period the water delivered to the Rincon Reservation by Project 176 facilities may be substantially reduced or stopped; however, wells on the reservation can be operated to help

compensate for the loss of water. All river flow and the canal intake during the annual maintenance period passes down the natural streambed of the San Luis Rey. Vista and Mutual customers can receive stored water from Lake Wohlford during the maintenance period.

F. *Escondido's Operation Agreement*

In 1971 Mutual and the City of Escondido entered into an operating agreement whereby the city operates all of Mutual's property and facilities except the licensed Escondido Project, excluding Lake Wohlford. Under the agreement, the city furnishes all administration, labor and materials for operation and maintenance of Lake Wohlford, but Mutual and Vista continue to operate and maintain the Escondido Canal through the Joint Superintendent.

Electric generating facilities at the Rincon and Bear Valley powerhouses are operated by Mutual, which receives the net income from the sale of electrical energy. Historically, of all of the power generated by the project, 95 percent has been sold to San Diego Gas and Electric Company and the remainder sold to the Rincon Indians.

In managing the project, the city is obligated to honor all existing contracts between Mutual and other parties. This obligation includes delivery of water and electrical energy to the Rincon Indians, transportation of Vista water, and electrical energy to San Diego Gas and Electric Company. The operating agreement provides that the financial status of Mutual will not show a profit or loss and that the net value of Mutual's investment will not decrease or increase.

The canal is operated and maintained by a canal superintendent. His salary and operating and maintenance costs are jointly shared by Mutual and Vista. The joint canal superintendent and two canal patrolmen are responsible for operation and maintenance of the canal from the San Luis

Rey River diversion dam to the canal outlet near Lake Wohlford. The superintendent keeps all records and computes the volume of water available to satisfy water entitlements and contracts and also maintains the access roads and the canal communication system.

G. *Summary on the environmental impact*

The Commission's procedural guide to the carrying out of the Natural Environmental Policy Act of 1969 (Order No. 485) applies to major projects only, those over 2,000 horsepower. Since Mutual's power program, at 760 KW (equals 1,019 hp.), is a minor project, no separate environmental statements were first called for from the Staff. When the hearings were well along in 1973, it became evident that No. 176 is a minor project in name only and, all hands agreeing, the Commission was asked whether an exception was not clearly indicated. Responding on November 19, 1973, the Commission directed full environmental treatment. The draft statement issued in the following September, and the final, along with a dozen or so federal and state agency comments, came out in August, 1975. (S-60) Hearings on its many issues were completed in January 1976.

In truth, however, the entire record is an environmental statement. The essence of Mutual's case is to point with pride to the advance of civilization made possible by the water diversion, the change from arid lands to green hills and valleys, now the avocado capital of the world, with even a claim of some betterment to the La Jollas for their fishery and the Rincons for their nearly-assured 6 cfs of water for irrigation. Mutual plans to continue it, so there is no additional environmental impact at all from a new license, excepting as the plan to remove most all of the San Pasqual canal section to private lands means an improve-

ment to that extent (it will now be undergrounded) — improvement, that is, if it be presumed that the presence of the canal structure is now a detriment, and that has hardly been proved aside from a few minor particulars of less than monumental consequence.¹

The Bands' plan is a quite differnt [sic] one, but not so much in the canal itself, which will be unchanged and its operation continued, though with much less water. They would not plan the undergrounding at San Pasqual, nor have the money to do it if they wanted to; so, to the extent the Bands claim the canal is an environmental burden to their reservations (a thought expressed often, but not very loudly), the Bands' plan continues that "burden" through San Pasqual while Mutual would virtually eliminate it.

The real and important environmental effect is the very end result sought by the Bands — one hopes not a fustian and over-ambitious one — over 50 years to convert 10,500 acres of arable land from its present chapparal or relatively unused state into orchards and crop-growing agriculture. Some detriment to wild life and of course to the state of nature is inevitable. If that conversion is contrary to pre-Columbian Amerindian culture, as sometimes pointed out, it is hardly apt for the white civilization whose plows broke the plains now to condemn it as an environmental intrusion.

The details have all been set forth in S-60 and in the two parties' corresponding coverage. One defect is serious enough to be noted — Lake Wohlford is an important recreational resource for the whole area, and if the Bands succeed in reducing its water intake by half or more, its acceptability could significantly diminish. One possible

¹Some road crossings have already been protected by fencing, as a result of questions raised at the hearing. The plan to fence in the remainder on San Pasqual will cure most of the defects noted.

measure to counteract that has not been explored — recalling that Vista was quite successful in its pumping program, to bring out more water from the meadows and hills above Henshaw, perhaps a similar effort above Wohlford by Mutual and Escondido could find a lot of replacement water in their own Escondido Creek watershed.

In summary, Mutual is satisfied they have long since improved the environment of the area of their interest and they want to continue it. The Bands, in perhaps their most eloquent argument of all, at the close of their brief, conclude (at page 218), "What the river once did for Escondido and Vista, it can now do for the Bands."

VI

THE PLAN FOR CONGRESSIONAL TAKEOVER

This question must come up first, because if the answer is yes then under the statute, no long-term license may issue at all until the Congress has two years to act on the Commission's recommendation.

Preliminarily, the policy guidance normally to be sought from the statute is simply non-existent. Not one word appears to tell the Commission when to recommend and when not to — it says only:

"Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission . . . shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development (Section 7(b), 16USC800(b)).

Next, there is not the usual panoply of court and Commission precedents, because it has hardly ever come up for decision. But this does not mean we have nothing to go on. The statute has many words of policy guidance to show

what Congress wants the nation's waterways developed to be, all this in the licensing sections — 4, 7, 10, 14, 15. Indeed the winning license applicant is the one whose plan is "best adapted to a comprehensive plan" to achieve the many desiderata so far as possible.

Manifestly, therefore, the guide for takeover must be this very simple one, namely, if there is a program available and applied for to accomplish the law's objectives by the issue of a license under it, there is no need for, and so no occasion to recommend federalization by act of Congress.¹ Since substantially that solution is available here, see Chapter VIII below, any thought of a takeover recommendation is foreclosed.

With that answer there is no need to resolve, at this point, the highly litigious valuation question, but it is enough to note the Staff testimony that the allowable "net investment" is zero because the accumulated depreciation quite offsets the original cost. Their analysis applies the law quite literally, indeed, perhaps over-literally, since it leads to the extraordinary assumption that the successive consumer-owners who conceived, engineered, financed and built the project eighty years ago, rebuilt and enlarged it fifty years ago, ran it successfully and paid off all its expenses and investments without cash profits ever since, have now no equitable interest cognizable under the Fifth Amendment. That interest, per Mutual's brief, comes to \$6 million, so one may infer that is the size of the Court of Claims judgment

¹See *Pacific Gas and Electric Company*, 52 FPC 1898, 1901 (1974), where the Commission concluded that "[s]ince the public interest is served through operation and maintenance of the project by the Applicant, no useful objective would be obtained by a recommendation for takeover." cf. *Appalachian Power Co.*, Op. No. 698, 51 FPC 1906, 1933, (1974).

that would at least be sought, upon takeover with no payment at all.¹

VII

THE INDIANS' PLAN FOR AN IRRIGATION PROGRAM UNDER A "NONPOWER" LICENSE

Partly (but only partly) for lack of irrigation water, the greater part of the six Indian reservations is not used at all, at least not productively.

Partly, therefore (but only partly) the characteristic economy is a poor one, not abjectly so but relatively so.

Uncountable other factors affect both facets of this broad summarization — much of the land, especially in La Jolla, is too high, too dry or too mountainous for any ordinary crops, but a lot of the area has a potential; and what the six Bands (working together and with the Interior) propose is a long-range program to take over the project under the nonpower license law, including at least Mutual's half of the water, and to use the water either to irrigate their usable land or by its sale to raise the capital needed for the enterprise.

¹The record is full of argument whether the law really means to deduct depreciation when, as a non-profit mutual, the company has had no listed earnings (the point being that section 3 defines net investment as the original cost *minus* certain depreciation and amortization accounts but only "if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on the investment.") Mutual denies it has had earnings at all.

All that can be concluded at this puerile level is that the law's definition is inaptly drafted, and does not consensually provide for the case of a mutual company whose customers are its owners and stockholders, and no earnings as such have been recorded. Besides, one remembers the Commission's recent comment that "depreciation" at the time of the Water Power Act of 1920 meant something entirely different from its present usage — at that time the concept of depreciation referred to an equipment replacement reserve, while now it is a means of recovery of the original investment. *Boston Edison*, Opinion No. 729A, August 4, 1975, p.2. How the Congress of 1920 would have treated recapture from a mutual concern can hardly be guessed from the extensive legislative history all focused on quite different enterprises.

The six reservations include:

- (1) The two in the San Luis Rey valley which are crossed by the canal (La Jolla and Rincon),
- (2) the San Pasqual, also used for the canal but not located in the valley,
- (3) The large Pala reservation which lies across the natural river bed 10 miles or so below the point of Mutual's diversion dam (which, of course, at that point normally takes out all the water for transfer across the mountain to Escondido and Vista), and
- (4) two very small reservations near Pala, in the valley but above the stream bed.

Their total population is less than 600, but the six Bands' membership includes an equal number living elsewhere. It is their obvious need that inspires this ambitious program which would gradually establish 200 or so acres each year and irrigate avocado groves primarily, this being the characteristic "money crop" in the whole area.

For fuller background, see Chapter V above, and for the full water inventory, as planned over the long range, there is a most telling Exhibit B-95 (which is attached hereto for the official filing, but, for lack of copies, not with the service list).

Premitting the broad analysis of economic feasibility which would be called for in other circumstances, it is enough to summarize that the plan is a grand one, full of hazards as well as possibilities, but depending on a suitable supply of enterprise, diligence, expertise, capital and, primarily, water.

There is some evidence of an awakening aura of enterprise — witness the campground facility planned for Pala and the public fishery operation at La Jolla. If the water and the capital be provided, the program would have some chance,

provided only that diligence be demonstrated — if the native irrigators and cultivators produce even half the diligence of their team of lawyers, *some* such program *might* succeed.

Per the joint brief, taken pretty well from their Exhibit B-110:

“The plan calls for the agricultural development of some 10,500 acres of Indian land over 50 years, an average of approximately 200 acres per year. ‘The water supply for the proposed Indian project will be comprised of pumped ground water and surface flows of the San Luis Rey River (including water pumped from the groundwater basin above Lake Henshaw) and tributary inflow of the San Luis Rey watershed originating below Henshaw Dam.’ Bands’ and Interior’s Exhibit W at p. 4.

“Since the Bands will not be able to utilize all of the waters of the San Luis Rey River at once, there will be surplus waters available for sale to users either within or outside of the San Luis Rey watershed. The Indians’ consumptive use will increase at the average annual rate of approximately 300 acre feet per year.

“The Bands’ and Interior’s proposal contemplates different treatment for Vista as compared to Mutual. Vista is the owner and operator of Lake Henshaw and Henshaw Dam, and that will not change as a result of this proceeding. The Bands and Interior would need cooperation from Vista in the form of the timing of releases from Lake Henshaw just as Vista would require the use of Indian lands to transport its San Luis Rey River water supply from Lake Henshaw to Lake Wohlford. On the other hand, if the Bands and Interior prevail, Mutual will not have any control over the San Luis Rey River or its physical distribution facilities. Hence, during the initial 25-year operation, the Bands and Interior propose to deliver to Vista the same quantity of water that it has historically received on terms

that we think are extremely fair. Instead of paying Mutual for the use of the conduit and contributing to the budget of the joint canal Superintendent, Vista would pay the Bands and/or Interior a charge of approximately one-half the cost of MWD water purchased by Vista. While this charge may result in somewhat higher costs for Vista's water users, the projected increase (or decrease) has not been calculated, and is not anticipated to be significant. . . . Thus, for the first 25 years of operation under the Bands' and Interior's plans, Vista will suffer very little, if at all.

"During the first 25 years of project operations, the Bands and Interior propose to increase their use of water from the historical average of 1,500 acre feet (Rincon release, Ex. B-66) to 8,900 acre feet (1,500 a.f. plus 7,400 a.f. that have historically gone to Mutual) at the average rate of approximately 300 a.f. per year. The water that is not needed to irrigate the Indian lands, or to recharge the Pala and Pauma Basins, or to prevent groundwater quality deterioration will be sold, preferably to users within the San Luis Rey River Basin but perhaps also to Mutual. This water will be priced competitively with MWD imported water. With the resulting income, the Bands will have generated the capital that is so vitally needed to construct and maintain facilities to deliver water to their lands, to clear their lands, plant the trees, in short to do everything necessary to make the reservations bloom. . . .

"After the first 25 years, the Bands and Interior propose to acquire Vista's interest in Lake Henshaw and some or all of the groundwater basin above Henshaw at a negotiated price. . . . Then they will follow the same pattern for the second 25-year phase, increasing their own use at the rate of 300 a.f. per year and

selling their surplus at MWD rates.''¹

Basically, for any license to issue at all, we are supposed to be satisfied of the economic feasibility of the entire enterprise as planned. To apply that test here is difficult indeed, to put it mildly.

First, the Indians' ambitious program necessarily takes a lot of capital for the irrigation works alone, not to mention the clearing of land, the planting of trees and (in the case of avocados) waiting about seven years for the first revenues, assuming the nascent orchard has been adequately watered and cared for all that time.

Second, the Indians are hardly to be expected to raise the initial capital by the means that would normally be employed, such as a widely-subscribed issue of stock — the way Mutual got started in the 1890's — nor by the convenient borrowing on a long-term mortgage. They simply haven't the money to subscribe to the stock, and the Government's own restrictions on their land titles prevent their entering the mortgage bond market. The Government's brief, as signed for the Secretary of the Interior, does not contain any commitment, or even a small business loan, to get things going.

Third, the plan is necessarily quite flexible; in fact, the present plan did not enter the record until the Bands' 110th exhibit in 1974.

All of these considerations, plus a basic doubt whether the Bands would have any water to plan about, cause the Staff to conclude they are quite unconvinced as to the fea-

¹Numerous footnotes are omitted. Note that the schematic diagram which is in this record as Exhibit B-95 shows the input and output of water at each point under conditions as presumed to develop after 25 years. A similar, earlier exhibit (B-49-A) illustrates the longer plan, over a 50-year period.

sibility of the whole program.

Upon the subject of expertise, the Bands have made some beginnings by the employment of a competent hydraulic engineer to plan their whole enterprise, and they may count on some help, both in planning and in operations, from the Bureau of Indian Affairs office at Riverside, but that is 100 miles away. The maintenance of the canal is not at all a simple operation — stoppages or "outages" occur once or twice a year, mostly due to storms, rockslides, leakages, vandalism and other hazards (M-208). They indicated they would plan to continue the employment of the present Joint Superintendent and his small staff.

What is missing is any clear idea of the Bands' substitute for the policy, fiscal, supervisory and management functions now performed jointly by the boards of directors of Mutual and of the Vista Irrigation District. Again, some help in that direction will come from the Riverside office, but whether that will substitute for the informed judgment of experienced personnel on the site has not been developed.

The real problem is water: Dwarfing all the above considerations, if there be issued a nonpower license, what happens to the 15,000 acre feet or so of water which now goes through the canal, a little over half controlled by the Vista Irrigation District and a little less than half by Mutual? There lies the rub.

The Staff's position on the water impasses is stated very simply, viz.: Without the water, the whole design fails in its entirety, the Bands do not now have the water rights, and their prospects for obtaining water are "extremely conjectural." The point is that Vista and Mutual between them claim all of the water rights under state law, based on contracts, grants, appropriations and permits extending back into the 1890's, including deeds from riparian owners up

and down the river and contracts with the then Indian Bands. On many grounds, the Bands dispute these rights, or else they expect the license itself to give them the water rights.

The first problem is that the dispute is a long-standing one, of great complexity under both the California and the Federal law, and it now is and for some years past has been the subject of a definitive lawsuit in the United States District Court at San Diego. The suit is a very broad one, its bill of complaint is about 50 pages long, it has been in hearing from time to time, and evidently no one doubts the jurisdiction as well as the propriety of that Court's power and responsibility to decide the matter.

In that state of affairs, the doctrine of *lis pendens* applies; there can be no thought of here reviewing the hundreds of court decisions, title deeds and other documents in the record — on the one hand to establish or disestablish the ancient validity of the water rights of Mutual and Vista, on the other, to affirm or disaffirm the Government's obligation under a 1914 contract and another in 1922 to respect those rights and to take no action which would impair them.

There is quite a panoply of citation and authority to the effect that the water deeds and contracts are invalid for a variety of reasons. Then there is a claim they must bow to the Bands' superior right granted to them by the Mission Indian Relief Act of 1891 and by the judicial interpretation of the public land laws in what is known as the *Winters* doctrine,¹ which, as explained only last year, means simply that the Government's establishment of a reservation carries with it by implication an appropriation of the "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." (Quoting Cappaert v.

¹From a decision of 1908 in *Winters v. U.S.*, 207 U.S. 564.

U.S., 426 U.S. 128, (1976)).

This awesome challenge to the very basis of their project is not lost upon Escondido and Mutual, who respond that their basic water rights arise from appropriations which were filed as early as 1891, all confirmed by four or five contracts since then, several of them with the United States as contracting party.

Evidently there is no dispute that water rights, here or anywhere else, are a creature of the state law excepting only as they may be affected by the Federal rules referred to. In that situation, the obvious answer is the one so clearly put by the Staff, namely that the right of use of the water must, for present purposes, be taken to be that of Mutual and Vista, from which it follows that, unless the new nonpower license should transfer some or all of those rights to the Bands, there is a complete failure of the subject matter of the Bands' application, the *res*, and the application cannot be approved. All of this for the following three reasons:

(a) *Res adjudicata*: Article 24 of the license issued by this Commission in 1924 analyzes the water rights as then proved and understood and indicates they were found to be satisfactorily established, subject only to the Government's agreement of 1914 on behalf of the Rincon Indians.² That determination was made by the Commission in 1924, and it records an understanding that has been acted upon by the parties ever since 1895. It hardly seems competent for the Commission now to go into it again at all.

²The right of the Rincons is continued throughout this proceeding, and it has been recognized from the earliest days, though with a lot of controversy about the resulting amount. Briefly, what it is supposed to provide is a delivery from the canal into the Rincon reservation of water in the amount of six cubic feet per second (when needed or wanted by the Rincons) but only if the natural flow of the river (as reconstructed without Henshaw Dam) would have produced that quantity).

(b) Anyway, it is before the United States District Court, and it is for that Court to decide. There are several actions by the United States on behalf of the several Indian Bands, all asking for relief comparable to what is asked here, and it is hardly for the Federal Power Commission to anticipate or to prejudice the final action of the Court. Obviously, however, should the Bands prevail in the Court and acquire a substantial right of use of the water now flowing in the canal, their application could here be reinstated.

(c) Anyway, water rights are not the Commission's business. In another California case (East Bay Municipal Utility District), in the 13th page of the first volume of the Commission Reports, decided in 1932, there was questioned the right of a proposed licensee to use the waters of a river flowing out of the lands of the United States, that right being evidenced by a state water permit.

The conclusion was that

"The Federal Power Commission has no jurisdiction to adjudicate private rights to the use of water or property where such rights or property, as in the case of the right to use water for irrigation, is vested in the jurisdiction of the State."

(Mostly the Commission relied on Section 27, Federal Water Power Act, as to which see below.)

Transfer by license: The joint brief of the Department of Interior and of the several Bands recognized the Mutual-Vista claim of title, at least as a colorable one, saying their various points "at the very least" cast a doubt on those claims. But, even so, they point to the takeover sections of the law and claim those rights, whatever they be, as transferred by operation of law on the issue of a new, nonpower license to the Bands. This brings up what is perhaps the most obvious and least reconcilable ambiguity or conflict of the many that have been remarked in the original law,

which still remain for solution. The point is that one part of the law conveys the water rights to a new licensee, while another part of the law is totally to the opposite. So which one prevails?

The background is well developed in the Interior Department's letter explaining their various proposed conditions, see Exhibit I-78-A at page 7. Briefly, the point is that divestiture of the present licensee, and its transfer to a new one, requires that the new licensee pay the net investment to the old one, and that net investment covers the cost of the water rights as well as the cost of the tangible property transferred. This comes out by reading together Sections 3, 14 and 15 in this wise:

(a) The nonpower licensee must, under Section 15(b), pay the old licensee such amount as the United States would be required to do for takeover under Section 14.

(b) The section incorporated, No. 14, requires the Government on takeover from the private licensee to pay for its net investment in the project, "nor shall the values allowed for water rights . . . be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee."

(c) Finally, Section 3 defines the project so as to include all water rights and rights-of-way "necessary or appropriate in the maintenance and operation of such unit."

So, the syllogism is seen to be inexorable, the nonpower license to the Bands follows the procedure and entails the same rights and obligations as a takeover by Congress under Section 14, which includes water rights, and the water rights so paid for may and must be transferred along with the dam, the "ditch" and other structures of the project. So it results that the issue of the license to the Bands would transfer the right to the use and occupancy of the dam, ditches and water courses and would necessarily also transfer the right, what-

ever the former licensee had, to the use of the water, meaning to carry it through the canal. This is expanded by implication of the Bands or the Interior to mean that not only may the water be carried through the canal, it may also be diverted, consumed and used for purposes entirely different from that contemplated in the original license, an expansion not at all q.e.d.

At this point, contrast Section 27, which, in extenso, reads as follows:

"Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

A more obvious conflict seems hard to imagine, assuming Sections 3-14-15 would, by themselves, transfer to the Bands in their non-power license the full right to take over, appropriate, transfer, use and consume the water rights of the present licensee. Even if that be accomplished by those sections, it is totally and definitively negated and withdrawn by the flat language of Section 27. From what little has been written on the subject, it can only be conjectured that the earlier sections contemplated the relatively minor water right appurtenant to a normal water power project (which, after all, is the real subject of the law), that is, the right to "pond" the water for a time behind a dam and to pass it through the waterpower works. In contrast, the water right here in question is the much broader one which is the very subject of the prohibition in Section 27, that is, the *consumptive* use of water for irrigation, municipal and other

uses.¹

In drought-ridden California, it would be a scary thing to suggest that water rights thoroughly established under the aegis of state law are not property or proprietary rights, thus expressly saved from divestiture by Section 27 of the Federal Water Power Act. Accordingly, the conclusion is that (a) the state water rights were demonstrated and accepted here in 1924, (b) that if that long-ago conclusion is now to be upset, it must be by the pending action in the United States District Court, not in this proceeding, and (c) that the take-over language of Sections 14 and 15 may not operate to affect those rights of Mutual (let alone unlicensed Vista), nor to carry with it the right to use the canal's flow for irrigation and consumption on the reservations.

Even so, this perhaps all-too-obvious conclusion does not satisfy Interior and the Bands. We are pointed to the obvious truism under water law that a water right does not mean water ownership, but only the right to use the water for certain established purposes, from which it is said to follow that when that established purpose is quite cut off and no longer available, then the right itself ceases and determines, an explicit case of expiration due to non-user.

They point out that no one here among the 70 or so experts testifying has disclosed any possible way for Mutual and

¹For what little background on this there is, but hardly a direct holding here, see the two leading cases, namely *Southern California Edison Company* (1949), 8 FPC 364, and *First Iowa Hydro-Electric Cooperative v. FPC* (1946), 328 U.S. 152, where the Supreme Court explains (at page 175):

"The effect of S. 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase 'any vested right acquired therein' further emphasizes the application of the Section to property rights."

Vista to use their water for its dedicated purpose, irrigation and municipal distribution, except after its passage through the canal. So it follows that, when the right to use the canal ceases by expiration of the license, the water right itself expires and is lost entirely. The argument is intriguing, but how that result can follow from a law which, per Section 27, is not allowed to affect the state laws about use of water for irrigation "or any vested right acquired therein" can hardly be imagined.

Anyway, it is hard to conjure that such metaphysics or legerdemain are supposed to govern such serious, practical affairs as the subject matter of this case. *This* forum has to take it that the water rights have long since been established under state law, their claimed invalidity is the subject matter of a present suit before the District Court; until that Court effects a change in that result, the water rights must remain where they are, and no licensing procedure here can take them away.

It seems inexorable that, without the water, the Indians have no project at all, and upon that basis alone, without raising many of the obvious doubts that could be raised on the subject of expertise, diligence, capital and other elements discussed above, it must follow that the application for a nonpower license is required to be denied. This does not foreclose a reopening of the matter in the event that the final judgment of the Court should substantially change the basic water right which is the subject matter of the litigation, i.e., should it confirm in the Bands a right to the use of a substantial amount of the water which was taken many years ago under the several contracts which are now claimed to be invalid and *ultra vires*.

This concludes the question of the issue of a license to the Bands, either "nonpower" as applied for or as a competing applicant for a new license under Section 15, as

sometimes discussed—in short, no water, no license. It will be time enough to consider the question of feasibility and other matters if and when the water right question is otherwise resolved.

(Footnote for the question above about the organization to manage the project: The application says merely that “the Bands intend to charter an organization made up of representatives of the applying Bands (including the Pala Band if it so chooses) to operate the project facilities. . . .”)

This conclusion also makes it unnecessary to consider the obvious and possibly fatal defect arising from the Bands’ plan gradually to vacate and cease the small power operations now carried on, when water is available. (The hydraulic head at the Rincon cutoff would be used for irrigation, not to make electricity, and the Bear Valley powerhouse would obviously suffer from lack of water.) Nevertheless, to consider a nonpower license, Section 15(b) requires first a finding that “all or part of any licensed project should no longer be used or adapted for use for power purposes.” However minor that present power production may be, this would hardly seem to be the time to try to support any such finding—only the other day, so we read in the *Star*,

“The President has directed the Corps of Engineers to report within three months on the potential for additional hydropower installations at existing dams throughout the country — especially at small sites”

¹Oakes, *Harness The Little Dams*, *The Washington Star*, May 20, 1977, at A-15, col. F (quoting from “The 28-page fact sheet issued last month by President Carter’s National Energy Program.”)

VIII
MUTUAL'S PLAN FOR THE STATUS QUO
(AS CHANGED)

The Escondido Mutual Water Company has filed for a 50-year renewal of its license for Project 176. Mutual's filing was timely, its exhibits in order; Mutual has dotted all the i's and crossed all the t's. Aside from two important changes discussed below, Mutual proposes to continue (along with Vista) to operate the canal at least until 2027, to continue to bring out "its" water plus "Vista's water, and to deliver the Rincon reservation" 10% share, to continue to produce a little electric power (at least until the equipment wears out), and to continue, perhaps improve, the Lake Wohlford recreational facility. Before the project operations are reviewed, a number of very high legal hurdles must be surmounted.

1. *The legal questions:*

It is of no moment to appraise Mutual's plan against the law's standard of a best plan for "comprehensive development" if, as the Interior-Bands' joint brief proclaims, several statutes (five in all) specifically and totally disentitle Mutual to be licensed at all. Indeed, we read, several of the statutory bans are actually "dispositive", a lawyer's way of saying: "That's it, that's all there is to it." So, they are here taken up, one at a time.

(a) *Interior's conditions:*

In the Power Act, as explained above, Section 15 directs the Commission's actions on relicensing, and may or may not incorporate Section 4, whose standards directly apply to licensing as distinguished from re-licensing. For actions taken under Section 4, this *proviso* applies:

"*Provided*, that licenses shall be issued within any reservation . . . subject to and contain such conditions

as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."

The Secretary's required conditions came into the record as Exhibit I-78, and caused a reaction not short of consternation. After suitable rounds of talks, the hearing convened itself into a formal conference of all parties with the Commissioner of Indian Affairs, the Solicitor of the Interior Department, and the Associate Solicitor for Indian Affairs. The discussion resulted in some revisions, and the new conditions appear as Exhibits 78-A and -B.

To try to summarize them briefly, in general they come to the following:

1. Henshaw Dam and Lake Henshaw (not now licensed) must be included in an FPC license. (Included below.)
2. Vista may not use its lands above Henshaw in a manner to "adversely affect downstream water quality or quantity."
3. Vista must agree to the license and accept FPC jurisdiction. (Included below.)
4. There must be no infringement upon the right of the Bands to use water to the total amount of 42,185 acre feet, on an annual average, and 62,155 acre feet as a maximum annual diversion. (Note these amounts are roughly three to five times the total quantity of water expected to be available at Henshaw, on the average, according to the Bands' Exhibit B-95.)
5. No water pumped from the ground above Lake Henshaw may be transported through the canal without prior agreement of the Bands.
6. The three reservations which the canal crosses may take water from the conduit for their purposes and for re-

charging the groundwater basin, in amounts specified by the Commissioner of Indian Affairs, and they may exceed the quantities specified above and need not be limited to the natural flow of the river.

7. The releases required by No. 6 must be allowed to continue until the Court rules otherwise.

8. Mutual and Vista to agree to pay annual charges fixed by FPC based on the commercial value of the tribal lands for the most profitable suitable purposes, including water and power development. (See below.)

9. Vista to agree to drill wells in the Pala area, pursuant to the 1922 contract.

10. The grant of the right-of-way is not to preclude agricultural use of the lands included within it but not actually utilized by the canal. (See below.)

11. No new use is to be made of the reservation lands without prior written approval of the Band, Interior and FPC.

12. The canal conduit through San Pasqual is to be covered over, and any portion of the canal no longer in use is to be removed. (See below.)

We are assured these are the minimum needed, as the law says, for the "adequate preservation and utilization" of the several reservations; we are reminded the reservations are the Secretary's responsibility, not the Commission's, and that the applicant's 100% refusal of any such conditions simply closes their case.

It is manifest the conditions were designed not to improve the project but to destroy it. The joint brief at page 63 seems to confess as much, saying their net effect is to "resemble the operations under the nonpower license or recapture alternative, for that is the only way to assure the adequate protection and utilization of the reservation."!

If that sort of approach is what the conditioning requirement of Section 4 contemplates, i.e., a Secretarial veto, made confessedly with total disdain for the survival of the project itself and for the law's standard of comprehensive development, then this six-year proceeding has been an expensive waste of time; no room remains for the Commission's judgment; and, if it were to become the custom in other cases, the hydro power potentialities of the nation's many reservations cannot contribute to the national need, nor can their avails be realized for the Indians' benefit. Reminder is apropos that in this case the few miles of the canal within the reservations contribute only one-fifth of the total project, and if the real purpose here is to monopolize its entire benefits, the result can only be to nullify the project and deprive the Bands of a very valuable and profitable resource.

Fortunately, there is authority that relicensing is under Section 15, not Section 4.¹ In a later Order in the PG&E case, the Commission said: "We note that under the Act new licenses are issued under Section 15 rather than under Section 4(e)." (Order, February 19, 1975, p.619.) Cf. Northern States Power Company, *infra*; see also the legislative history materials on the recapture law or relicensing law, as assembled in the reply brief of Escondido-Vista.

The Staff demonstrates quite convincingly that the Secretarial veto, however it may control a new license, is incompatible with the Commission's responsibilities on relicensing under Section 15, making this distinction between the situation of a new project, not yet built or licensed and the relicensing of a project long since built and operating:

¹Pacific Gas & Electric Company, 52 FPC 1898 (1974); Cf. Montana Power Company, 38 FPC 766, 786 (1967), affirmed (CADC), 445 F.2d 739.

“When considering whether to authorize the construction of a new hydroelectric project, there are a number of concerns which are particularly applicable in an initial licensing proceeding. Plans for structures affecting navigability are customarily referred by the Commission for approval by the Corps of Engineers before making a final decision on the application. Input is solicited from the Secretary of the Interior where tribal lands within an Indian reservation would be included within a proposed project. Where it finds that a government dam is advantageous for other public uses than navigation, the Commission may not issue a license for two years after having reported such findings to the Congress. The concerns germane to an initial licensing proceeding are of historical interest when relicensing is at issue.

Section 15(a) of the Act refers to the “*then existing laws and regulations*” and presumes that an initial license was issued at some point in the past in accordance with Section 4(e), and further that a new license be issued under Section 15(a). The need in relicensing proceedings is primarily to update the terms and conditions of that license so that the new license conforms to laws in existence at the time of relicensing which were not of concern at the time of initial licensing. *Hearings on H.R. 12698 before the House Committee on Interstate & Foreign Commerce*, (90th Congress, 2d Session, pp. 69-70 (1968)).”

It is one thing to impose unilateral conditions for a new project, before any investment has been committed or “sunk”, as the utility people say. But applied to a completed project, especially one laden with a mortgage,¹ it amounts to a condemnation.

¹The canal is all paid for, but the Secretarial conditions affect Henshaw Dam also, and Vista is still heavily in debt for its purchase of Henshaw 30 years ago.

(b) *Interference:*

A second *proviso* of Section 4 — obviously applicable to new, unconstructed projects and at least for consideration in relicensing, along with the rest of the law — reads:

“... Licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired.
....”

Parenthetically, note that all hands join in wanting the canal to continue to be operated, not abandoned, just as it has been carrying water for over 80 years, so it is not a question of interference now to be caused by building the canal or anything else. Thus, it is not a claim of physical interference by the project works; rather, it is the claim that the project operations take away the water, and there lies the continuing interference. But note also that the Commission made the requisite non-interference finding when it issued the original license in 1924, and this with the concurrence of the Department of the Interior.

The purpose of the reservations so to be preserved from interference is shown to be the economic and domiciliary benefit of the Indians, a purpose which, even without the law's proviso, would be for carrying out so far as possible under the general standard of Section 10(e). Neither can there be doubted the Interior-Bands' opening gambit that the reservations' establishment carried with it *some* measure² of its available, unappropriated water resources, so far as needed to carry out that purpose — the *Winters* doctrine as reaffirmed only last year (*Cappaert v. United States*, 426 U.S. 128 (1976)). Whether the *Winters*-reserved water rights

²Probably, it means no more than the natural flow of the river, not the long, steady flow developed years later by Henshaw Dam.

survived the various water right purchase deeds and contracts of Mutual and Vista is one of the main issues now before the District Court at San Diego, and so is not for consideration here, see Chapter IV above.

Anyway, premising that the canal across their lands is an essential part of Mutual's total project, whose program, after all, is to take away 90% of the water of the San Luis Rey, the canal operation is condemned as a flat interference with the water supply needed for the reservations' purpose,¹ and preserved by *Winters*. So, the finding would fail.

The Staff is a little more direct, adopting, for this condition as well as for the one just above, that the stipulations of Section 4(e) are for new projects, and are not, either by law or by reason, applicable to relicensing. In contrast, the Interior-Bands' brief, forsaking the plain language of the proviso, manages to convert the words "finding by the

¹For background on the purpose for which the reservations were established, the joint brief is extremely helpful in its correlation of early legislative and other history. It is shown that the reservations were set aside under the Mission Indian Relief Act of 1891, 26 Stat. 712, an enactment largely motivated to give effect to an historic survey and report in 1884 by Helen Hunt Jackson and A. Kinney (Ex. Doc. 49, 48th Cong.). Their report on the Rincon Band and reservation includes this interesting mention of water use, as surveyed by the authors during the 1880's:

"The Mission Indians have been so long without any protection from the law that outrages and depredations upon them have become the practice in all white communities near which they live. . . . Lands occupied by Indians . . . are filed on for homestead entry precisely as if they were vacant lands.

" . . . The Rincon reservation is walled in to the south by high mountains. It is, as its name signifies, in a corner. Here is a village of nearly 200 Indians; their fields are fenced, well irrigated, and under good cultivation in grains and vegetables. They have stock—cattle, horses, and sheep. As we drove in the village, an Indian boy was on hand with his hoe to instantly repair the break in the embankment of the ditches across which we were obligated to drive." (Evidently the entire report is available only in the Natural Resources Library of the Department of the Interior, call number E77M67VII, pp. 7250-83.)

Commission" to read "judgment of the Bands under their right of self-government", which is quite a transposition indeed.

There may be passed over the quite possible point that this proviso was satisfied in the original licensing and that is quite enough for now, for it is hard to read Section 4 to require the dismantlement of every waterpower project (Hoover Dam, for example) when, 50 years later, the authorities change their mind about whether it interferes with the reservations' purpose.

There may also be passed over the even more obvious point (applicable both here and to the other proviso above) that Section 10(i), 16 USC 803(i), permits the Commission in its discretion to waive all the conditions and provisions of the Federal Water Power Act whenever waiver is deemed to be in the public interest (excepting only the 50-year period and the annual charges for Indian lands), where the project is classified as a minor one. To that end, if required, waiver of the two provisions of Section 4 is deemed to be in the public interest.

The better answer is that Mutual's project, *as conditioned below*, is not an interference with the reservations' purpose at all. Quite the contrary — it is the one and only practical, realizable program that gives promise to the Bands of (a) their *Winters* water, or some approximation of it, (b) its delivery at high points where and when it can be used for irrigation by gravity, and (c) an assured income and cash flow to make it work. In that light, the true finding is that the project does not interfere at all, instead it supports the purposes of the reservations.

(c) *Mission Relief Act:*

Quite in point is the Interior-Bands' reliance on the Mission Indian Relief Act of 1891, 26 Stat. 712, which, carrying out the Helen Hunt Jackson report cited above, called for

Interior to set up reservations for the Indians of the San Diego area, by the issue of trust patents for a limited period (often later extended and still in effect).

What is relied on is its Section 8, on right-of-way for a flume, ditch or canal for conveyance of water. Before the trust patent issues, the Secretary may create such easements, provided the Indians be supplied sufficient water for domestic and irrigation use. After the trust patent issues, the Indian tribe or band may grant a similar arrangement, subject to the Secretary's approval. We are told that section is still the law of the land, and it means that Bands and only the Bands can grant the rights here sought, not the Bureau, not the Secretary, not the Commission and not anyone else.

There is a lot to their point that this narrow, specific statute for a narrow, specific territory and clientele quite survives the general, nation-wide Federal Water Power Act of 1920 and its re-enactment in 1935. This would be under the usual doctrine that the later general law need not replace the prior, specific one. But that is only a canon, not a rule.¹

The trouble with its application here² is that the later Acts were for hydroelectric power development and the licensing of all water conduits, power houses, dams and appurtenant works, water rights, rights-of-way, ditches, reservoirs and lands appropriate for operation of a complete unit of de-

¹It may be especially apt here in the light of the history indefatigably developed in the joint "brief." There is evidence that a threatened incursion in 1890 on the San Luis Rey was a part of the *res gestae* of the Mission Indian Relief enactment in the following year.

²This choice of law is especially difficult in the case of these Bands of Mission Indians, because of this startling statement in the brief of the Secretary of the Interior (jointly with the Bands) at page 72:

"What has happened since 1891 is a classic case study of bureaucratic mismanagement and failure to implement Congressional policy."

Of course, the Department of the Interior fully approved the license in 1924, and then found it no interference with the reservations' purpose.

velopment. But the 1891 Act had no such purpose. Anyway, the point is not open here, because the Commission in several cases has concluded that hydro projects are governed by the Federal Power Act, not by earlier, special or local legislation or treaties.¹

(d) *Wheeler-Howard Act*

One of the bands (San Pasqual) elected to incorporate itself under the Indian Reorganization Act of 1934, a statute which quite plainly vests in the organized tribe, and only in the tribe, the power to convey any interest in or encumbrance upon their realty. Here, they have never sanctioned the canal or given it any right-of-way, nor do they do so now. Ergo, the syllogism concludes, no new license may now issue across their reservation.

The answer is the same as before, but clearer. A year after the 1934 enactment, the Federal Power Act was enacted, carrying forward the 1920 Water Power Act, and it is the 1935 law that is here invoked. Just as plain and straightforward as the 1934 law about Indian tribes, the 1935 law calls upon FPC to grant rights-of-way over Indian reservations. It mentions no exception for tribal lands governed by the two acts of 1891, or by Indian treaties or by any other laws. Indeed, it plainly, of its own force and words,

¹See the cases cited above, also Northern States Power Company, Opinion No. 664, 50 FPC 753, which is criticized by the Court of Appeals at 510 F.2d 198, 211, to which it might be responded that the 1920-1935 Federal Power Acts were indeed intended to gather into one agency the scattered authorities which had hitherto governed power sites either under the laws relating to Indians, or to navigation, forestry, or several other special purposes. This is shown by the repealer in Section 29, which made only one exception, the Raker Act of 1913, and the further exception made for the national parks in the Act of March 3, 1921, 41 Stat. 1353. It was very much the purpose of Congress to regulate power sites on the rivers and in the public lands and reservations, treating them all alike and impartially, without a favored position for any of the special interests which were the subject of quite a number of previous special laws, such as the Mission Indian Relief Act.

includes licenses in the reservations of tribes that have been organized under the 1934 Reorganization Act, see the special reference to them in Section 10(e). That specific designation and citation would have no meaning at all if the Commission were not by the 1935 Act empowered to take the very action which the law of the year before had seemed to delegate to the Tribes. That is, Section 10(e) talks about annual charges for Indian tribal lands under the jurisdiction of the 1934 law cited, and, of course, there would be no occasion for annual charges if the Commission had no power to issue the license in the first place.¹

(e) *Annual charges:*

The fifth law invoked to bar the action here is the annual charge Section just mentioned, which is treated below.

2. *Economics*

Both Escondido and Vista use the waters of the San Luis Rey to fill out their needs, getting a majority of their water from the Metropolitan Water District, which is supplied from the Colorado River aqueduct. Evidently, they could get more in that way; at the time of the hearing, they were, looking forward to sharing in the Northern California water from the new California aqueduct, a source which evidently at this time would not be available. The whole point is that the San Luis Rey water is of much higher quality and costs only about half as much; there lies the issue in the case. These considerations are excellently put in the Staff brief, which is quoted as follows from pages 7 and 8:

"The Cities of Escondido and Vista, as well as Mutual and Vista Irrigation Districts, have much at stake

¹See the discussion on this subject in the Northern States-LaCourte Oreilles Opinions cited above, both, however, being advisory dictum, because all that was there decided was the need to issue an annual license pending consideration of the relicense.

in continuing the project operation under a new 50-year license. *Project water is remarkably better in quality than the Colorado River water imported from the Colorado River via the Metropolitan Water District of Southern California (MWD) to the San Diego County Water Authority and finally to these parties. San Luis Rey water transported through the canal averages 300-400 parts per million (PPM) while Colorado River water averages 800 PPM. Higher dissolved solid content means more salinity.* (3 Tr. 550).

Vista's Witness Collins, beginning at 8 Tr. 1634, explained that Vista received 54% of its total water requirements from the project and 46% from the aqueduct system (the barrels). Vista provides water for the City of Vista as well as for its agricultural users. Mutual & the City of Escondido obtain approximately 35% of their water demands from the project and 65% from the aqueduct. Both of these entities should be regarded in this proceeding as partners in their future relationship involving the land. (8 Tr. 1635, lines 20-24). Mr. Collins states that Vista's present demand is divided into 40% agriculture and 60% domestic.

He also explained that Vista purchases 6,000 acre feet of water per year from the aqueduct at \$40 per acre foot totaling \$240,000 per year. This represents 46% of Vista water needs. If Vista was forced to purchase 100% of aqueduct water, assuming that it could not transport its own Lake Henshaw water through the project because the Bands held it under a non-power license or it was recaptured, the costs would more than double. This would in the range of \$700,000 per year forcing a substantial increase of rates to the domestic and agricultural users, and also providing substantially inferior water for agricultural use. (See 8 Tr. beginning at p. 1700). Exhibit V-4 indicates that the net increased costs to Vista customers in 1977-78 would be \$681,895

if the project can no longer transport its water from Lake Henshaw. Today this figure can be assumed to have increased due to inflation."

(This difference in the alkalinity [300-400 parts per million in San Luis Rey and 800 parts per million from the Colorado River] is much more serious than it sounds. As nearly as it can be figured, 800 parts per million means that if an acre is irrigated with only 12 inches of water over a season, there will be deposited over a ton of salts on that one acre, compared to about 900 pounds from the San Luis Rey water. This means, in practice, that much more water is required to leach it away.)

So it is plain that, as a matter of simple economics, the project is immensely valuable to Escondido, to Mutual and to Vista. Measuring it by the extra costs of buying the water elsewhere means roughly \$400,000 per year, per the Bands, or perhaps \$500,000 to \$600,000 per year, per the Staff's analysis. (But from either figure, there would be for deduction the amount of annual charges assessed below.)

3. *Annual Charges*

Annual charges against a licensee are called for by Section 10(e) of the law, referring to licenses for the use of tribal lands within Indian reservations, in which case—

"...the Commission shall...subject to the approval of the Indian tribe having jurisdiction of such lands as provided in Section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing. . . ."

Section 10 goes on to exempt minor projects (such as here) "except on tribal lands within Indian reservations."

Later on, the Commission may, in the case of minor projects, waive all the requirements of the law except, once again, that for Indian lands.

First, which tribe's approval? The Interior-Bands joint brief quite correctly develops why this means *all* the Bands affected, not merely the one (San Pasqual) actually incorporated under the Indian Reorganization Act. The law does not mention incorporation; all three of the Bands have an equal jurisdiction, one through its corporation and the others by their election, under the 1934 statute cited, to continue to exercise their rights without incorporation. (Note that Section 10's second and third references to Indians make no distinction as to incorporation, none is demanded by the first reference, and no reason can be imagined for inventing a distinction based on corporateness.)

Second, what does "approval" mean? Reading the first clause with that literalness that makes a fortress of the dictionary (as so eloquently derided by Judge Learned Hand in *Cabell v. Markham*, 148 F 2d 737, 739), Interior-Bands translate it to mean "in such amount as the Band shall determine, decide and announce." Like the similar questions discussed above, that reading would mean a tribal veto, a right to charge whatever the traffic will bear, the net value of the whole project to the licensees, or enough more to nullify it entirely. Indeed, their witnesses' adoption of that approach nullifies their testimony on any real question of value or contribution or sharing or reasonableness.

Actually, it is already settled that the law means post-approval, that is, if the amount fixed by the Commission does not, upon its announcement, command the Bands' approval as a reasonable annual charge, then the Bands and Interior may call for its reconsideration and correction by judicial review. *Montana Power Co. v. FPC* (CADC) 445 F 2d 739, 756; *id.* 459 F 2d 863, 874.

The six witnesses on what is a "reasonable charge" are noteworthy in their disagreement. The Bands' engineer and appraiser are quite frank, for "reasonable" means whatever they can get, or nearly 100% of the total net benefits of the project, estimated at around \$400,000 per year; meaning the extra costs for Escondido and Vista to buy an equal amount of Colorado River water—a formula which sequesters all the benefits, with no recognition at all for the contribution of the greater part of the enterprise. It quite escapes one how this is supposed to be reasonable.

Not entirely in contrast, Mutual coldly values the Indian acreage by its commercial leasing potential, as if farmed out for agriculture (without water), and comes up with a figure of about \$10,000-\$12,000 per year, or 3% of the total benefits. Against this apparent offer—the position is unclear—they seem not to demand an offsetting credit for the manifold benefits to the Bands they somehow perceive in this program to divert most all of the San Luis Rey to a distant vale and to alien beneficiaries.

Except for one immaterial detail that is taken up below (re San Diego's lateral power line), the Staff has labored on this subject with a dispassionate, impressive, sensitive and reasoned approach. Its result is to share equitably the net benefits of the entire program, to charge about \$61,000 as a 20% sharing of the overall benefits, on the basis that the canal is a unique resource, a *sine qua non* of the whole—even as Henshaw, the river, the lake and the power plants have also their unique contribution. Only part of the canal is on Indian land—most of the rest is on public lands requiring no contribution—but it is the reservation sections that provide the remarkable terrain that makes it possible to bring water by gravity alone over and across a mountain range, the key to the whole thing.

In the sense this question is perhaps the most sensitive, moot, and arguable or all, and in the view the Staff's presentation is so well organized and articulated as to command agreement, their brief is here copied *in extenso*, and is here adopted (except for the power line detail) as the statutory fixation of charges under the new license; as follows:

Mutual-City, the Bands and Interior, and the Staff submitted testimony with supporting exhibits on the annual charge issue. The questions are basically as follows: (1) how much should Mutual-City and Vista as new licensees pay to the La Jolla, Rincon, and San Pasqual Bands for the use of certain portions of their reservations by Project No. 176; (2) how much should San Diego Gas and Electric Company pay the Rincon Band for the use of a part of their reservation to continue to operate the Project No. 559 Transmission Line license; (3) how much should Mutual, the original licensee, pay as a re-adjustment of annual charges from 1970 through the end of the original license period including the annual license periods; and (4) how much should Mutual-City and Vista pay the United States for the use of Cleveland National Forest lands and Bureau of Land Management lands by Project No. 176?

The majority of the testimony and exhibits on this subject concerns payment to the La Jolla's, Rincon's, and San Pasqual's for use of their lands. Heretofore, the sole annual charge paid by Mutual pursuant to the original license has been \$25.00 annually paid to the San Pasqual Band.

Staff submitted two witnesses on these three issues — Robert G. Uhler and Charles M. Payne. These witnesses presented different views, methodology, and end result in dollar amounts for annual charges to the Bands. The purpose of two differing Staff witness is to present to Your Honor and the Commission two distinct approaches toward determination of annual charges for Indian Reservations. Once

the Commission determines the route they wish to utilize in determining annual charges, this approach can be abandoned by Staff Counsel in future proceedings. For purposes of the instant proceeding, Staff Counsel will determine which Staff witness's testimony he will recommend for a decision herein.

The Bands presented Witnesses Harry R. Fenton and Thomas M. Stetson with testimony and exhibits on the annual charge issues. Generally, they would have Mutual-City-Vista pay almost 100% of the annual net benefits received from operation of Project No. 176 to the La Jolla's, Rincon's, and San Pasqual's for use of their lands. Specifically, Exhibit B-158 determines the total net Benefits for 1974-75 and allocates 70% to the Bands and 30% to Mutual-City-Vista.

Mutual-City-presented Witnesses David O. Powell and Robert M. Dodd. Witness Dodd's final annual charge figure would be based primarily upon the mechanics of acreage valuation for the acres of Indian lands utilized by the license.

The Bands' Witness Stetson has presented a unique and complex formula under which he would have this Commission not only determine the annual charges, but also a division of the total annual charge figure between the La Jolla's, Rincon's, and San Pasqual's. Translated, the bands would put FPC in the Indian business in lieu of a decision which should be made by the Bureau of Indian Affairs or the individual Bands for distribution of the total annual charge among the three Bands.

Staff Counsel believes Staff Witness Uhler's testimony and methodology are the most convincing in the circumstances. His direct testimony in Exhibit S-59 coupled with Exhibits S-62 and S-63, and especially his testimony on cross-examination and re-direct examination, defines the

parameters of the annual charge issue and the application of the unique facts of this case to the determination of a reasonable annual charge for use of the Bands' land by future licensees of Project No. 176.

Section 10(e) of the Act provides, *inter alia*, that the Commission must "fix a reasonable annual charge for the use" of Indian lands by a licensee. No exception to a charge can be made for tribal or Indian reservations. Section 10(i) also precludes waivers of charges for use of Indian reservation lands.

This case is one of first impression on this issue involving relicensing. On the other hand, there is some authority on the issue of re-adjustment of annual charges. The *Montana* case is cited extensively in our proceeding with varying [sic] degrees of importance. See *The Montana Power Company, Project No. 5*, 22 FPC 502(1959); *The Montana Power Company v. F.P.C.*, 298 F² 335 (DCA, 1962); *The Montana Power Company, Project No. 5*, 38 FPC 766(1967); *The Montana Power Company v. F.P.C.*, 445 F² 739 (DCA, 1972). Some parties gave this case great weight [sic] and attempted to fit our present fact situation within its confines. On the other hand, both Staff witnesses used it only as a line of departure in determining a reasonable annual charge. Staff Counsel agrees with their approach. Obviously, *Montana* does not fit the four corners of the unique facts of the Escondido case. The utilization of acreage as the prime basis for calculation of the annual charge here is not proper. Staff is not bound by *Montana's* narrow confines. The reasoning there was fruitful in that instance, but not determinative in Escondido. Staff concludes from a study of *Montana* and our difficult deliberations here that annual charges must be considered on a case by case basis where the facts of each case must be considered on their own merits in order to result in the fixing of a *reasonable annual charge* as con-

templated by the Act.

Staff Counsel has previously stated his support for Witness Uhler's reasoning and decision on the method of calculating annual charges to be paid to the three Bands for the *future* use of their lands. The crux of Mr. Uhler's contribution is found in the transcript of the proceedings. He followed some of the rationale of *Montana, supra*, by employing a 2-step procedure for determining the annual charge. Step (1) would determine the value of the project, i.e., the total net benefits, to the licensee. Step (2) would determine what portion of the total benefits was attributable to the use of Indian lands, i.e., the apportionment of the benefits to the licensee and to the Indians. (40 Tr. 8572). Witness Stetson also agrees with this 2-step method. (Exhibit B-134, p. 3, lines 16-21). Witness Uhler then described the 50-50 apportionment of the total net benefits determined in *Montana*. The Montana Power Company received 50% of the benefits, while the Flathead Indians on whose lands part of the project rested received 50% of one half of the benefits. He then proceeded to distinguish the *Montana* 50-50 split and declared that in the instant case, he could not agree to such an apportionment [sic] as opposed to a 70-30 split or a 60-40 split *Montana* remember, was an annual charge readjustment proceeding. (40 Tr. 8580-82). When asked by Counsel Pelcyger if the 50-50 apportionment made sense where there is no new investment contemplated by Mutual-City during a new 50-year license, Witness Uhler replied that first, *Montana* should not be applied indiscriminately in this case to reach a reasonable annual charge, and second that the project does have economic value if relicensed because it transmits water [generates electrical energy] notwithstanding it was fully depreciated during the original license term. (40 Tr. 8586-90). Your Honor recognized this in commenting. (p. 8590). One of the basic reasons for the

Bands' and Interior's claim to almost 100% of the total net benefits of the license is that no substantial capital outlay will be necessary during the second 50-year license period coupled with the fact that the project is fully depreciated. They contend that the three Bands receive most of the benefits as the price of doing business by using Indian lands. Such would be equitable because there would be no project without the use of Indian lands.

Finally, Your Honor asked Mr. Uhler, "What is the reasonable annual charge to be assessed?" (40 Tr. 8610). He announced his 80-20 apportionment; 80% to Mutual-City-Vista and 20% to the Bands. (40 Tr. 8625). He proceeded to indicate the major elements needed to determine Step (1), the total net benefits. He included the entire Project No. 176 as it exists today plus the Henshaw Dam and Reservoir facilities which he considers a part of the total integrated system. (40 Tr. 8613-41 Tr. 8821). He determined the water benefit to be the difference between what it now costs Mutual and Vista as they presently operate the entire system, and the price of Metropolitan Water District water in quantities sufficient to replace project water. This was estimated to be approximately \$400,000 per year based on Witness Stetson's estimates. Mr. Uhler then added the net value of the Rincon and Bear Valley generation. This is akin to the net benefits method employed in *Montana, supra*. He estimated \$109,000 per year for value of the generation totaling approximately \$509,000 per year net benefits, based on Stetson's and his own estimates. The rounded figures of \$400,000 and \$100,000 equalling \$500,000 were used for quick calculations. (40 Tr. 8613-22).

Having determined an estimated \$500,000 as the total net benefits of the project, Witness Uhler addressed himself to Step (2), the apportionment of the net benefits. In doing this, he did not attempt a mechanical assessment of contri-

bution based on acreage which he appeared to do in Exhibit S-58. He noted that there are contributions because of their *unique* situation of the particular appurtenance to the system which do not limit themselves to a proportionability based on acreage. (40 Tr. 8622-23). He cited Lake Henshaw, the Diversion Dam, and the conduit as being particularly unique in our fact situation. (41 Tr. 8825). "If you just took acreage involved in the canal, you would be underemphasizing the importance of that property," he stated. Other considerations are (1) Mutual's creation of the project which has economic value and is valuable to the local society; (2) Mutual's organizational non-profitability does not take from the value of the project; and (3) the contribution of the parts as a whole. (40 Tr. 8623-25). These considerations led him to the 80% - 20% apportionment which, in the circumstances of this proceeding, are reasonable. And *reasonable* annual charges are what Section 10(e) requires. He admits that this apportionment is a judgment decision wherein the Bands will receive 20% of the whole. (40 Tr. 8628)

Witness Uhler further stated that one of the things he thought must be considered in determining a reasonable charge is that the resources of the Escondido-Vista community should be used in a way that benefits the community. The mixing of those resources under the original license attempted to maximize the public interest. He concluded that the Indian 20% would benefit them proportionately to their contribution, while 80% to Mutual-City-Vista benefits the overall public interest of the community at large who has come to rely upon the project operation, plus the licensees who had the foresight to establish this item of economic value, i.e., the project, and operate it to the benefit of many. He also believes 100% of the benefits to the Bands would be a "windfall". (40 Tr. 8626).

On cross-examination by Counsel Engstrand, Mr. Uhler reiterated his position at length more clearly and concisely than on the previous day. (41 Tr. 3813 - 26). Mutual's Counsel Engstrand accused him of pulling the 80% - 20% split "out of the air" which was not based upon any accepted economic theories. (41 Tr. 8839-40). Witness Uhler explained that the "theory of the firm" (41 Tr. 8837 - 40-42) coupled with the "principle of contribution" were utilized in his thinking. (41 Tr. 8842-44, 8850-51)

Witness Uhler's testimony in Exhibit S-58, page 19, lines 4-9, where he stated that the Bands are now adequately compensated based on the value of the 6 cfs flow of water and electricity benefits received pursuant to the 1914 contract, [sic] came under attack on cross examination by Interior's Counsel Ranquist. (41 Tr. 8912-8918/8950). This testimony was made to appear that Mr. Uhler believed the Bands had been compensated enough without further payments of annual charges. Your Honor also got this feeling. (41 Tr. 8919/8950). Staff agrees that the testimony was not well constructed. Witness Uhler, on redirect examination, acknowledged as much and recognized that the benefits received from the water entitlement and electricity received via the 1914 contract are benefits already belonging to the Bands over and above what they should receive as annual charges. (41 Tr. 9007-08). In addition, he made it clear that his 80% - 20% apportionment determination was not "pulled out of the air over the lunch hour" as charged by Counsel Engstrand. He stated that his testimony in Exhibit S-58, particularly at page 17 therein, followed closely his response to Judge Ellis who asked what his bottom line figure was. He had considered the outcome of a reasonable annual charge since 1975 when he was assigned the task of preparing such testimony. (41 Tr. 9010-11)

Having established the rounded figure of \$500,000 as the total net benefits per annum under Step (1), and the 80% — 20% apportionment of those benefits under Step (2), Staff will try to define more specifically the actual dollar figures appropriate for the reasonable annual charge to be paid *en blanc* to the La Jolla, Rincon, and San Pasqual Bands for the future use of their lands by Project No. 176.

The only hard evidence in the record that succinctly [sic] establishes dollar amounts for the definitive net benefits is found in the Bands' Exhibit B-158 sponsored by Witness Stetson. This Exhibit was offered only after the parties had concluded their annual charge presentations. Its preparation is based upon the final analysis of the Bands' case, and at the same time enables Staff to arrive at definitive figures in support of Witness Uhler's position on annual charges regarding Indian lands. The Exhibit, is limited to the locked-in period of 1974-75 actual costs.

Mr. Uhler's method would determine the total net benefits of the entire project which would include Vista's share of the water benefits. Using Exhibit B-158, a calculation of all of the net benefits is as follows:

\$160,400	—	Mutual water benefits
62,500	—	Vista " "
<hr/>		
\$222,900		
9,600	—	Rincon Power Plant benefits
51,124	—	Bear Valley Power Plant benefits.
<hr/>		
\$283,624		
50,000	—	Lake Wolhford [sic] recreational benefits
<hr/>		
\$333,624	—	net benefits

Because Henshaw Dam and Reservoir will be included in a new 50-year license under Staff's proposal, it would be appropriate to add the Henshaw recreational benefits to the \$333,624 calculated above to arrive at total net benefits of

the entire future project. Counsel Wright read into the record the revenues received by Vista from the recreational [sic] uses made of Henshaw Lake. These are covered by a lease to the Warner Resort Company which expires in 1985, but contains a 10-year option to renew for an additional term expiring on October 31, 1995. All recreational revenues received by Vista are received from the Warner Resort Company. The revenues for 1973, 1974, and 1975 were \$25,000 per year. (50 Tr. 10,450-1)

So adding:

\$333,624
<u>25,000</u>

\$358,624 — total net benefits for 1974-75.

Step 2 of Mr. Uhler's method is to allocate 20% of these benefits to the Rincon's, La Jolla's, and San Pasual's [sic] *en toto*.

Thus:

\$358,624
<u>20%</u>

\$ 61,724.80 — total annual charges for future license based on 1974-1975 figures.

For determination of annual charges under a new license, it seems reasonable to Staff to require the new licensees Mutual-City-Vista to forward to the Commission in January of each year their total revenues and expenses as of December 31st of the previous calendar year breaking the figures down to their revenues and expenses concerning water operations; Rincon and Bear Valley Power Plant operations; and Lake Henshaw and Lake Wohlford recreational operations in order that the total net benefits of the project can be determined and the 80% — 20% allocation formula be applied.

Staff does not recommend that this Commission determine what percentage the three Bands receive from the total annual charge. The Bands' Witness Stetson went to great lengths in Exhibits B-134 through B-147 to present a method for the Commission to follow in making such a division of the total annual charges. Staff does not understand why they and Interior wish this Commission to make such a division. It seems logical that the Bureau of Indian Affairs should do this since they have jurisdiction over almost every aspect of Indian activity. If not the BIA, then the Bands themselves should agree to a division of the money. It does not appear that this Commission is the logical agency to reach out from Washington and do an act which can and should be decided on the local level. Indeed, there is no language in the Federal Power Act that compels nor implies that the Commission so act. Staff takes a negative position on this sub-issue and will say no more.

The next issue is to determine what, if any, re-adjustment should be made to the existing annual charge of \$25.00 from 1970 through the remaining period of the original license. We begin with 1970 because that is when Interior first raised the question in its "Complaint" filed on September 25, 1970. However, the Bands first raised the question in a Petition of Intervention filed with FPC on September 22, 1969. They moved to intervene in the proceeding concerning the application for transfer of Mutual's license to the City of Escondido. That application was withdrawn. Section 10(e) of the Act states that annual charges can be "re-adjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter, upon notice and opportunity for hearing." Staff believes it is logical to apply Witness Uhler's methodology to the re-adjustment issue as well. A re-adjustment is in order under the facts. The same

calculation of total net benefits and application of the 80% — 20% allocation formula would apply. But Mutual alone can be compelled to forward its figures for this period since it is the sole licensee under the original license. By the same token, it alone can be ordered to pay by the Commission. Mutual is left to its own devices to obtain aid on these payments from Vista or the City, but SDG&E must pay its share for the existing transmission line.

As noted earlier, Staff Witness Payne presented a different methodology in arriving at annual charges for use of the three Bands' land by a future licensee for Project No. 176. He also testified on the administrative annual charges required by Section 10(e) of the Act (Exhibit S-59, page 4, lines 14-17) arriving at a figure of \$50.65 per annum. This figure was not contested. Furthermore, he testified on the subject of Federal land charges for the amount of United States lands used by the Licensee outside of the Indian Reservations. His bottom line figure here was \$2.40 per acre per annum. (Exhibit S-59, page 5, lines 8-13). Staff Counsel supports Mr. Payne's conclusions on the subject of administrative charges under the Act, and the charge for use of United States lands.

One other matter must be discussed. While Staff Counsel recommends the Uhler method for charges on Indian lands, this is not to say that the methodology employed by Staff Witness Payne is of no consequence. It might well be that his testimony will be determined by Your Honor and/or the Commission to be appropriate in the circumstances. He also used *Montana, supra*, as a point of departure. He does not follow *Montana* exclusively, but does apply a variation to arrive at his formula for the annual charges. (Exhibit S-59, pp. 8-14). He would determine the net benefits attributable to the operation of Project No. 176 by finding the average annual water benefits and power plant benefits of Bear Val-

ley and Rincon, less the average annual O. & M. expenses. (See Exhibit S-62). His formula then divides the net benefits on a 50% — 50% basis, i.e., 50% to the Owner/Developer of the project facilities, and 50% to be apportioned on the basis of land ownership. (See Exhibit S-63). Determination of the charges for S.D.G.&E.'s transmission line license would require plugging in the right-of-way acreage of the line to the apportionment formula in S-63. The bottom line total annual charge figure would be approximately \$18,220 using 87 acres of Indian land as Mutual's Exhibit W states, and approximately \$19,680 using 94 acres as the Bands claim.

That concludes the copying on this point from the Staff Brief.

As to retroactivity to past (and current) periods, the statute is most unclear, and surely does not call for an award of damages, so to speak, by dating back the annual charge order to the original license date. A re-fixing of the amount (which was zero as of 1924)¹ could have been undertaken on the twentieth anniversary, and not oftener than each decade thereafter. Under the Montana Power case cited, it can go back, within those limits, to the date of the filing of a plea or complaint for such a redetermination, which was September 1970. The measure of the allowance can hardly exceed the one used in that case, which divided the benefits between the developer and the land owner, and applied the latter according to acreage contributed. That is the approach of the Staff witness Payne here, and results in a figure of \$18,220 per year.

It results, accordingly, that the annual charges should be, and are hereby assessed, at \$18,200 per year from Septem-

¹About 20 years ago, San Pasqual was awarded \$25 per year, for some reason. Nobody else gets anything.

ber 1970 through the duration of the present licensing, and for any new license, at the figure resulting from the Staff's 20% allocation from and after the date of the order awarding a new license.

4. *Conditions to be attached:*

The licensing law, in Section 10(g), specifies that all licenses issued under its sanction shall be on such "other conditions not inconsistent with the provisions of this Act as the Commission may require."

Moreover, each license is to be conditioned upon the acceptance of all its terms and conditions "and such further conditions, if any, as the Commission shall prescribe in conformity with this Act. . . ." (Section 6)

Many such conditions are relatively standard and are evidently without controversy here. The form for use in this matter, indeed for the license as a whole, is found in the Staff brief from pages 75 to 90, which is here incorporated by reference, with such slight alterations as are required by the foregoing.

The first 26 conditions or "articles" are those taken from the standard Form L-16 of October, 1975 (excepting No. 19). The proposed new Article 27 contains the annual charge required for administration of the Act and for the use of the public lands (as distinguished from the reservations). Article 28 is an assumption of liability for injury to buildings and other property of the United States, and the next two Articles incorporate the 1914 and 1922 contracts, which have been discussed above. No. 31 provides the annual charge under the formula just set forth, but Articles 33 and 34 will be revised to incorporate the above formula for the period beginning in 1970. Conditions are added also respecting Vista Irrigation District and Henshaw Dam, as to which see below.

Certain additional Articles will be required to meet the special circumstances discussed above, viz.:

The San Diego litigation: One of the more puzzling aspects of this case is its correlation with the current and pending litigation before the United States District Court in San Diego, which, as explained, has for its purpose the virtual cancellation of the water rights which are the heart of this project. Indeed, as set out in Chapter VII above, the Bands' application can hardly be considered on its merits until the water rights are obtained.

Correspondingly, should the net result of that litigation deprive Escondido, Mutual and/ or Vista of any and all right to remove the waters of the San Luis Rey from this valley, for carriage across the mountain to Escondido Creek, then the very subject matter of Mutual's license and this entire cause will require to be reopened and reconsidered, including the possible cancellation of the license or its transfer to someone else, or the issue of a nonpower license to the Bands or to someone else, or a possible recommendation to Congress for Federal takeover under Section 14. Accordingly, there is required the following Article:

"Article 36. In the event there shall occur a change in the water rights of Mutual or Vista so that the amount of water which they may carry through the canal is substantially diminished, this license will be subject to cancellation, revision, reconsideration, transfer or other action appropriate under the law, all after due notice, hearing on the record as may be required, and determination by the Commission under the laws as they may then be in effect."

Telephone lines: One of the claims of trespass and non-compliance with the license since 1924 arises from Mutual's need for a telephone line over the length of the canal, to connect with the operator's cottage at the diversion point.

In many parts, it was not practical to keep the line strictly within the right-of-way — we noted (in the canyon portion) the line running from rock to rock, wherever it could go to get around the hills. The consequences do not seem to be especially serious or actually of great damage to anyone, but it does amount at least to a technical incursion on unlicensed portions of the reservations. Staff wants the lines moved to be within the right-of-way, which is obviously desirable but may not always be found convenient; and if they are to be continued outside the project boundary, a compensatory charge is required. Accordingly —

“Article 37. For any telephone or other wire lines which Mutual finds it necessary to maintain outside the boundaries of its right-of-way but within the reservations, the annual charges otherwise herein imposed are hereby increased by \$100 per mile per year for each line so located. However, this charge is remitted to the extent the telephone poles for any such lines are also used for telephone service to the Indian residents.¹

Henshaw Dam: For the clause on this subject, see Chapter IX, below.

Access roads: A lot of petty controversy has existed over the years about the location of access roads which have been required to be built by Mutual in order to reach portions of the canal, where necessary for maintenance. Many of the problems resulted from simple lack of cooperation on both sides and lack of appreciation on both sides for the respective needs of Mutual and of the residents. Accordingly —

“Article 38. The access roads herein licensed may be reconstituted and relocated where necessary pursuant to advance agreement between Mutual and the Band whose res-

¹See Exh. M-156 as to such usage currently on San Pasqual.

ervation is affected, and to review by the nearest office of the Bureau of Indian Affairs, if called upon.

Rights-of-way: One of the many mysteries of this case is why, in the case of a completed, installed canal, it is necessary to provide a right-of-way of up to 50 feet on either side. Often asked, the question was answered only by the reference to the need for approaching the sides by a truck for the purpose of repair, which seems to be a pretty wide truck.¹ It was suggested that a right-of-way of two feet on the north-west side and 10 feet on the south-east side would be ample. One reason for the controversy is the apparent attitude of the management that the existence of a mere right-of-way gives Mutual the right to exclude the land-owners from even entering upon the forbidden space, let alone using it.

However, perhaps the adequate answer is that provided by the proposed condition No. 10 of the Secretary of the Interior in Exhibit I-78-B, in effect preserving to the Bands the agricultural or other use of those portions of the lands included within the right-of-way that are not actually utilized for the facility itself. Accordingly, Article 39 should comprise Condition 10 taken from Exhibit I-78-B at page 5.

Water

Make no mistake, this case is about water — the modern California gold rush — it is not about lands or canals or dams or electricity. Everybody wants to continue the canal operation just as it is, maybe with less water to Escondido, and even continue the antebellum type of electric operation if they have to. The struggle is, who gets the water, when, where and how much.

¹In contrast, we noted that in the short spaces where private owners abut the canal, they have built a fence within a foot or so of the edge of the canal, without apparent harm to Mutual.

The Bands' plan was gradually to divert some of the water for irrigation on the reservation, sell to Mutual the balance of what they acquire of Mutual's present water, and carry Vista's water, for a price, to the Vista canal. The plan fails for several reasons, but mainly for lack of the water to start with.

Mutual's program is an aquatic status quo. Their water and Vista's will flow on as before, amounting to what seems to be 90% of the canal's flow, as an average. The balance is their diversion to the Rincon reservation, half-way down the canal, this in carrying out their 1914 contract to guarantee to the Rincons a quantity equal to six cubic feet per second of the natural flow of the river (to the extent and when there is any), as reconstructed to simulate the flow that would be occurring without Henshaw Dam.

Not always have the Rincons received it; not always have they wanted it or were prepared to make use of it, though their irrigation system is probably a century or more old. Even the figuring of their allotment came in dispute here, and during the case, Mutual's expert produced and put into operation a new formula, which enhanced their delivery; it has already improved the Rincon's position. But one hopes they have settled the picayune, alphonse and gaston argument whether the entitlement depends on their remembering to ask for it.

But a mystery remains. For all of the sheaves of nearly a century-old documents adduced, no one has been able to explain to this forum why only the Rincons were thought of in these arrangements made in the 1890's, 1914, 1922 *et seq.* True, there is not so much arable land in the mountains of La Jolla, but they are shown to need some water.

For the rest, there is no help at all. It was striking to look across the wide valleys toward Pauma and Yuima and see

verdant greenery all about, but only arid brown *on* those small reservations. The answer given was that their neighbors pump out the ground water, or buy it from the Colorado River supply district, while the reservations next door are dry, barren and infertile. Far down the river, Pala obviously needs water (and may by now be getting some help from pumps supposed to be installed by Vista under their old contract). As of now, Pala sees the San Luis Rey as a dry, rocky streambed (yet "pala" in the Luiseno language means "water").

The answer is: it is their river, their water, their heritage which Mutual's project drains away from them, albeit pursuant to ancient contracts not here and now available for reformation. But the law does permit conditions on the license in order more perfectly to carry out the law's purpose. The conditions, per Section 10(g), must not be "inconsistent with the provisions of this Act."

To be consistent, as it says, with "this Act", one turns to the law's basic *ratio decidendi* for what to license and what not to. Quoting again Section 10(a), one must find the project license to be:

"best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce,
for the improvement and utilization of water power development,
and for other beneficial public uses, including recreational purposes;
and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

So, the key is whether it is the *best* plan for other beneficial public uses, including recreational purposes. Mutual

does not present its plan as benefiting interstate commerce, or more than a scintilla of water power benefit. There is an appropriate recreational by-product (Lake Wohlford), but Mutual's real and avowed purpose is "other beneficial public uses", meaning, almost totally, this: more, better, and cheaper water for the residents and irrigators in and around Vista and Escondido. For *this* purpose, they value the project at about \$6,000,000 and over half a million dollars per year, all for the benefit of the people referred to, and none other, specifically *not* the Indians.

One is amazed to read at p. VI-8 (and I-8 and elsewhere) of Mutual's brief that:

"Of course, there is nothing in the Act, the legislative history or administrative interpretation which gives any support to the Bands' arguments that the socio-economic status of the Indians should be considered in awarding a license."

Mutual may be advised that the Indians are very much part of "the people of America" extolled in their brief (I-7) as the public beneficiaries intended by the law. The Bands do get flood control and a few other incidental benefits from Mutual's plan, but the Bands on the river itself get no water at all; indeed, they lose what they had, except the Rincons get their six cfs. With a condition correcting that omission, Mutual's *then* becomes the "best plan", etc.

It is the view, accordingly, that Mutual's program is not "best adapted to a comprehensive plan for . . . developing a waterway . . . for other beneficial public uses" unless it makes a like provision¹ for the common water needs of the other reservations in the valley, i.e., La Jolla, Pauma, Yuima,

¹The water right so affected is not preserved by Section 27, because the condition here is effective only on its voluntary acceptance by Mutual and Vista, as a part of their voluntary license.

and Pala.²

Finally, this provision (as well as Rincon's six cfs.) cannot be of its greatest avail to the Indians if it all comes during the flood season, and there is no natural flow available later on when it is most needed. Fortunately, Vista has ample room for added storage in its Henshaw Dam, without perceptible added cost or recognizable burden. So the condition may appropriately require that both moieties of the Indians' share of the water be stored and made available for delivery at useful times during the year.

So, the following condition attaches:

"Article 40.

In addition to its provision of water to the Rincons under the contracts referred to, the Licensees shall deliver an equal quantity for the use of the other Bands in the San Luis Rey valley, the delivery to be at such point on the project as may be required by the Bureau of Indian Affairs, and the water to be stored by the Licensees and made available to the Bands at and for such time periods, locations and uses as the Bureau may from time to time determine."

5. The project amendment.

Mutual's project status is not quite to remain quo. Shortly below the canal's entry into San Pasqual, still in hilly country, the canal is to be diverted southwesterly off the reservation, and to continue southwardly underground, alongside a county road, until it joins the present underground section, near the outlet to Lake Wohlford.

This will cost \$656,000 (M-203), and will advantage Mutual by adding security and avoiding contamination. (The

²San Pasqual is not listed because it is not in the valley; also, they are situated rather conveniently close to a community already served by the Metropolitan Water District, and could deal with that authority for water.

present canal, in a rural residential area, is open, unfenced, and near homes and grazing areas.) It will advantage San Pasqual in removing 12,000 feet of canal from its territory (releasing 18 acres from their present servitude), and the short section remaining (820') is to be fenced off. Hence the application amendment should be approved.

IX

SUBSIDIARY PARTIES AND ISSUES

1. *The City of Escondido.*

The present licensee is the Escondido Mutual Water Company, formed originally by the irrigators and other prospective water consumers of the Escondido area. It is now about a six-million-dollar company, but one not expected, indeed not supposed to make a profit. Some small part of the stock is already owned by the City of Escondido, the city has acquired voting rights to 90% of the stock, and there seems to be a nascent agreement which will result in Escondido owning the remainder after buying out the other stockholders.¹

So, in the more recent years of this case (November, 1975), the City of Escondido filed an application to become a joint applicant, with the Mutual Company, for the new license. Evidently, it is contemplated that after the license issues and the stock acquisition has been completed, Mutual will be dissolved and Escondido will seek to become the sole licensee (43T9343-9375). Actually, the city managers now run it, in the city offices.

¹The Bands figure that the purchase price of the stock attributable to the facilities of the project will amount to \$2,500,000 and will cost the water consumers of the city \$187,750 per year amortized over 40 years, a charge to the consumers which is indicated to be not far below their present benefit from the project in the form of cheaper water. (Interior-Bands' brief, p. 156, and references to the record there cited.)

If the people of the Escondido area prefer to operate through their municipality instead of through their Mutual Water Company, this arrangement would appear to be satisfactory for all normal questions relating to licensing, such as feasibility, public benefit and the like. No objection to this feature of the program as such has been noted, and it was pretty thoroughly discussed at the hearing.

However, a very serious question arises with respect to such a program related to any license on Indian lands held in trust status. The point is that such a license would be, for all practical purposes, in perpetuity, but neither this Commission nor the United States holds such title to the lands as to be able to grant a perpetual easement, such as the license would provide. The background is this:

By a fairly recent enactment, Act of August 15, 1953, 16 USC 828-828c, the Federal or Congressional takeover provision of the Federal Power Act (Section 14) is no longer to apply to any project owned by a state or municipality.¹

One takes this provision obviously to mean that, if a license shall now issue to the City of Escondido, as distinguished from the Mutual Water Company, it will no longer be subject to Federal takeover under Section 14 *when* that license expires. When that time comes, Section 15 will govern the issue of a new license, and Section 7 tells us that, in doing so, the Commission shall give preference to applications by municipalities if their plans are equally well adapted, etc.²

Though the license be one which, on its face, lasts only 50 years, but at the end of that period it is not subject to

¹There is also some uncertain language evidently limiting the annual charges applicable to a municipal project.

²There is some doubt about the preference and its applicability to relicensing, see Carolina Power and Light Company, Opinion No. 757 (1976) at page 4, but the language seems pretty plain.

Federal takeover under Section 14 of the Federal Power Act, and if there are conflicting, equally able applicants for a new license, very probably Escondido would have a statutory preference. And so on, after another 50 years, with the net result that a license to a city must be regarded as a perpetual one (subject only, of course, to the basic condemnation power by Act of Congress).

The trouble is: the present proposed licensor, namely the Federal Power Commission acting for the United States, does not have a perpetual title capable of granting a perpetual easement across Indian reservation lands held in trust status.

As specified in the Mission Indian Relief Act discussed above, the trust status is for a limited period only, which has been extended from time to time; and as the Interior Department advises us, citing many cases, "The Secretary of the Interior is not authorized to dispose of Indian trust property." (Ex. I-78-A, p. 6)

Thus, with the Government's own title thus encumbered, it is not perceived how, either legally or ethically, the Government can be in the position of granting a license which, *de facto* at least, is in perpetuity, but *de jure* is not and cannot be.

Accordingly, if the City of Escondido does wish to be considered as a co-licensee, it will have to file a stipulation to the effect that it does not now and will not hereafter claim an exemption from the takeover provision of Section 14 or the preference clause of Section 7. With that stipulation entered of record, and made expressly a condition of the license, no objection is perceived to issuing the license jointly to the City of Escondido as well as to the Escondido Mutual Water Company, nor, indeed, to its later transfer from the Water Company to the City alone.

2. *Vista and Henshaw Dam.*

(a) *Vista's unlicensed status:* An entirely separate docket in this multi-faceted proceeding is E-7655, concerning the Vista Irrigation District and the investigation of their status as a non-licensee, all as ordered by the Commission on July 30, 1971. For the background facts, see Chapter III above, under E-7655. Vista owns Henshaw Dam and claims most of the waters it impounds; some of the water is sold to Mutual. All of Vista's water passes through the project canal and without the canal the water would be of no apparent use to Vista.

It is complained Vista is a usurper, an intruder, a trespasser, for its water transits the canal without any Federal license, permit, easement or anything else. Furthermore, its water pumping program is illegal, for Vista since the 1950's has been supplementing the natural drainage into Lake Henshaw by a concerted program of pumping out groundwater from the lands lying above and around the lake, so the pumped water can flow into the lake and enlarge its water supply, all of which, it is alleged, damages (i.e., reduces) the downstream natural flow and the underground basin available for pumping by the downstream reservation Indians. Specifically it is presented as an activity which contravenes the necessary finding for a license (Section 4) to the effect the project is not inconsistent, with the purpose of the reservations establishment.

The Commission's Order calls for an investigation and hearing to consider the extent of Vista's involvement in Project 176 and the occupancy of any Indian or public lands. Consolidation was ordered.

Vista is not a licensee and does not want or ask for one. The dam and the lake are not on Indian lands, nor across a navigable river, nor was it built as a power dam or for power

purposes. It is evidently true that a minor corner of the dam (for the spillway) encroaches upon the lands of the Cleveland National Forest, so a Forest Service permit was obtained.

Vista's connection with the Project arises out of its 1922 contract with Mutual, giving Vista the right in perpetuity to pass its water through the canal. Some small part of Vista's share leaves Lake Wohlford through Mutual's separate penstock and is used to generate power there before joining the rest of Vista's water in another (non-project) canal which carries it twelve miles or so over to Vista.

Currently Vista is doing the engineering work on a rehabilitation of Henshaw Dam (its original 1922 design was much too large for the water available; besides there are seismic problems, and working with the state authorities it will be reduced somewhat, but in a manner soon to remove its Forest land encroachment).

It is odd that the 1924 license to Mutual does not mention Henshaw, lacking which, it is claimed, Vista's water passing through the canal constitutes a license violation, a trespass *quare clausum fregit*. No so at all, says Vista, pointing to letters and telegrams to the Commission in 1922-1924 reporting the nature of the contract and its connection with the program to be licensed. Before Mutual would accept the license in 1924, they asked for and received a telegram from FPC's Executive Secretary saying the 1922 contract is not incompatible with the license, so they accepted, and it was finally issued in June.

Neither is Henshaw Dam a secret, hidden away in the hills. In the next chapter, there is quoted a Commission minute of a 1926 meeting, concurring in a lands permit, which, in so many words, makes the statutory finding for an FPC license, virtually (if not really) issuing one.

(b) *Henshaw is part of the true total project:* Henshaw has no power facilities, but like any storage dam, it pro-

foundly affects and enhances the power production, downstream, such as it is, by its regulation of the highly seasonal flow. In that sense it is even more of the total enterprise than Lake Wohlford and Bear Valley Dam, just above the main powerhouse. Not to suffer abbreviation to abort the whole truth, the essential unity and correlation of all the parts of the "comprehensive development" can only be sensed by reviewing them in order, for it will be seen that, like each step of a staircase, each unit is a part of an integrated, whole development of the resources of the San Luis Rey.

From the agreed facts, from the maps in evidence and from inspection, it is obvious that the true "project", meaning the "complete unit of improvement or development", as the law says, comprises four distinct units; but only one of them is the subject of the present license or of the applications for new ones. The four discrete elements of the complete project are as follows:

(1) Lake Henshaw, Henshaw Dam, and its drainage area beyond, all of which is the property of the Vista Irrigation District, and none of which is included in licensed Project 176 (Lake Henshaw, however, is the source of nearly all the water that flows through Project 176 and the Staff wants it included in the license, or else in a new one to Vista.)

(2) About nine miles of the open-running San Luis Rey River, evidently about 10 feet wide (depending entirely on the gate opening at Henshaw Dam, its primary source). This, too, is not in the license, nor does anyone propose it to be. About half of the nine miles is on lands of the Cleveland National Forest or on public and private lands; the other half courses in a rather wild state through the La Jolla Indian reservation. Over this reach, the river falls 500 feet from

its beginning elevation of 2700 feet, and it is here that the La Jolla's have established an enterprising and profitable public fishery, one of the very few open river fishing sites in the whole San Diego area. Manifestly, its viability depends on the circumstance of whether a steady flow is being released from the dam.¹

(3) The present Project 176, as now licensed, meaning —

(i) the diversion dam athwart the San Luis Rey at a point in a canyon in the middle of the La Jolla reservation;

(ii) the artificial, man-made canal, which, by gravity alone, transports the water out of the San Luis Rey valley over to the valley of the Escondido Creek, for about 13 miles through and around the mountains, with perhaps a third of the canal passing through the three Indian reservations (La Jolla, Rincon and San Pasqual). The last mile or so is underground. Throughout, there is a 700-foot fall from the diversion dam to the outlet of the canal, and it is this fall which powers the movement of the water. The canal is not directly used for electric power purposes (except as a small part of the flow (10%) is diverted on the Rincon reservation to meet that Band's entitlement and, in the process, to produce a tiny amount of power, which is sold to the San Diego Company).

(iii) Lake Wohlford, into which the canal flows, an artificial lake formed by Bear Valley Dam,² the drop below which produces the power in the small project powerhouse located just below the dam. All of these, the diversion dam, the canal, the small diversion on the Rincon reservation,

¹Because of the autumnal shut down for maintenance, the fishery is "in and out", depending upon yearly fish planting.

²Mutual operates quite an impressive public boating, fishing and recreational facility on the lake.

Lake Wohlford, Bear Valley Dam and powerhouse, are the individual segments of the present Project 176, and are in the name of the present licensee, the Escondido Mutual Water Company.

(4) Vista's canal, extending 12 miles to the west from the project dam and powerhouse just described, which takes Vista's share of the Lake Henshaw water to the Vista Irrigation District for distribution and consumption.

Note again that parts 1, 2 and 4 above are not part of the present project as licensed. Note, too, that Lake Wohlford, though part of the project, is on private lands or lands of the Mutual Water Company.¹ Part 4, the Vista canal below Escondido, is not licensed here, and nobody wants it to be — not because it is not part of the whole enterprise; rather that is because the hydro power function ceases at step 3, just above it.

(c) *The result as to licensing:* The law, Section 3(11) tells us that a project (the subject matter of a license) is a "complete unit of improvement or development", including —

- a power house,
- all water conduits,
- all dams and appurtenant works and structures,
- all storage, diverting, or forebay reservoirs directly connected therewith,
- the primary connecting power lines,
- all miscellaneous structures,
- all water rights, rights-of-way, ditches, dams, reservoirs, lands or interest in lands necessary or appropriate in the operation of the unit.

It completely escapes one how it can be doubted that Henshaw Dam and Lake Henshaw are part of the project,

¹Less than one acre (out of 224) is on a corner of the public domain.

as so copiously defined. It is all operated as a unit, each step is affected by the steps ahead of it. The 1926 FPC minutes cited include power as a minor function resulting from Henshaw. The whole point is that, without Henshaw, the river becomes a trickle much of the time, and the power now bravely measured in horsepower would become listed in candlepower.

Of course it must be licensed as much as the rest, down to the power house. Staff puts it on the further ground that part of Henshaw is actually on the public lands. Even if that part be now removed, as planned, it is still for licensing because it is an essential part of the "complete unit of development."

Vista denies all this, repeating there is no electricity at Henshaw, and that under *Farmington*,¹ a facility built before 1935 is not subject to the enforcement clause of the Federal Power Act, Section 23(b); There is no reason to deny all that, but the point is Vista's water is the main user of the canal on the Indian lands, and some Vista water makes power there and below. To recognize that use, and to permit its continuance so Vista can reap that project benefit, it must in turn join in the license.

The procedural agenda is not difficult. If and when the Commission decides finally to license Project 176 for another term, the decision is subject to a two-year stay because of Interior's call for Congressional takeover, per Section 14(b). So, the license order need but specify that Vista must join in the application to the extent of (a) Henshaw Lake and Dam, and (b) the utilization of the canal. If there occurs no such joinder, the license may provide that it does not cover or sanction the transit of Vista's water.

¹*Farmington River Power Co. v. F.P.C.* (CA2, 1972) 455 F. 2d 86.

Finally, for the same reasons as set out above with respect to the City of Escondido, Vista would be expected to file the same stipulation waiving takeover exemption after 50 years (and preference for relicensing) as to the portions of the project on Indian lands.

3. *Noncompliance issues and the Interior Department complaint.*

This multi-faceted proceeding did not begin with the license application, but with a complaint filed in September, 1970, by the Secretary of the Interior, acting as trustee for the three Bands whose reservations are crossed by Mutual's canal. Both Mutual and the City of Escondido are listed as respondents. Quite a variety of allegations comprise the complaint, all related to malefactions and misfeasances of the licensee in No. 176 with relation to the terms of the amended license of 1924, all to the detriment of the three Bands. In April, 1971, the intervention of the Bands was permitted and the cause set for hearing. About the same time, Mutual filed for a renewal of its license, due to expire in June, 1974, so these matters were consolidated in the Order of July 30, 1971. Subsequently came the Department's recommendation for Federal takeover by act of Congress and the Bands' application for a non-power license, all part of this case.

A little later there came the Bands' petition for a declaratory order on the noncompliance issues, and for a ruling that the derelictions complained of should debar the issue of an annual license in 1974, otherwise due to issue in June. This was not set for hearing, so this forum's reference to the Commission on February 22, 1974, assembled the issues and cited the record adduced to date. In response, the Order of March 18, 1974, directed this forum to hear and determine the issues raised, and to recommend sanctions aimed

to cure the current violations, if proved, *provided* it be found "appropriate and necessary to grant immediate relief to the parties for such violations. . . ." So, the hearings already far along were directed to the points raised, and a separate briefing schedule was provided to permit early resolution of the current compliance matters (all while the license case was undergoing its two years of treatment under the environmental laws).

The limited-issue briefs came in during November 1974. Upon their review the forum reached the determination that remedies appropriate for the charges, if proved, did not call for immediate reformations, but are more appropriate for the relicensing determination itself. Accordingly, no recommended decision issued and the several questions remain unanswered.

The 1974 memorandum to the Commission listed nine separate items of variance charged, meaning specifics of the general allegation that operations developed over fifty years under color of the license differed substantially from what was intended by the terms and conditions of the 1924 license and its dozen or so *mesne* amendments. Fortunately, by the time of briefing on these issues late in 1974, Interior-Bands dropped five of the nine charges, or else, "they are not being pressed . . . at this time", for: (a) some items were covered by the amendments to the license, or (b) others were thought comparatively insignificant. The four charges which remain are here taken up in order, viz:

A. *Vista's water:*

Water out of Lake Henshaw, claimed by Vista, transits the canal without license (recall that Henshaw was not yet built in 1924). Of course, it is true Vista' [sic] water passes through the canal, as it has done since 1925 or 1926. It is true the license to Mutual (Vista has no license) does not

mention Vista's water as such.

The pages and pages of record and exhibits make it clear that Mutual's contract of 1922 with Vista's predecessor was with the record of Mutual's application when the license issued 53 years ago this month. It is shown that the Executive Secretary¹ was fully aware of it, per his telegram in April, and he then found no conflict between the program being licensed and the program which the contract required of Mutual, which detailed the carriage of the Henshaw water through the canal as impounded there and claimed by the dam's owner.

Later on, the Commission's Order of 1926 (*infra*) establishes that the Commission was aware of Henshaw's purpose and operations. Besides, at least a dozen other inspections, studies and reports have made it plain, from all of which it must be concluded that the Secretary of the Interior at that time, the Secretary of War, and the Secretary of Agriculture (those officials during the 1920's constituted the Federal Power Commission) regarded the passage of Henshaw water as sanctioned by the license. Interior-Bands are correct that is not quite decisive—what counts is the license, not what various functionaries knew was going on. But, at this late date, the uncertain language of the license issued by those officials must be taken to mean that the activities, including the passage of Vista water, which the officials knew about and intended to approve, were and are the activities which the license means, covers, and sanctions. That is, by now the words used in 1924 must be taken to authorize what the licensing officials thought it authorized, whether or not it would now be written differently.

¹Executive Secretary Merrill was a spokesman for the Commission, see *U.S. v. P.U.C.* 345 U.S. 295, 305 (1953).

Why the Henshaw water was not articulated in *haec verba* in the license itself cannot at this late date be explained; in any event, any new license will cure the defect. Vista's sequestration of the water, for later transit in the canal, may or may not be tortious or unauthorized; that question is before the United States District Court and is not for comment or adjudication here. The passage of the water by itself did not and does not affect the Bands or cause harm or damage to them. Vista's original taking of the water is not for adjudication here, nor does the acceptance here of its passage through the canal imply confirmation of Vista's sequestration of the water.

B. *Escondido Water*:

This is the same charge, except it refers to Henshaw-stored water which Vista sells to Mutual under the 1922 contract. Of course the water transits the canal; that is the contract's purpose and Mutual's purpose. It did motivate some enlargement of the canal and establishment of a new diversion dam. As to the water itself, the above answer applies equally here.

It seems to be conceded that a lot of the construction program, some tunneling and minor re-routing of the canal, the changes in the diversion works and the operator's cottage, were completed in a disturbing number of occasions without advance authorization by the Commission and the proper revision of plans, K-maps and engineering data on file here.

It is manifest the company has put its construction work, operations and maintenance far ahead of its paperwork (so, doubtless did Goethals, de Lesseps, Eads and Roebling). At least all the changes seem to have been approved, *nunc pro tunc*, in one or another of the 13 amendments to the license over 50 years.

It may be expressed as a hope that Mutual's six-year ordeal in the paperwork of this very case, and its problems of explanation and verification, have taught a lesson, so to speak. Just as the Bands are due for better treatment in some of the matters herein considered, so also are the Commission's regulations due for greater respect. Actually, with the City taking over management, there is reason (as one appraises the various officials testifying) to expect a more respectable measure of compliance hereafter. Nothing more is now required.

C. Pumping:

The third count is the conveyance through the canal of water which Vista has gathered by pumping from its private lands around and above Lake Henshaw. The change is: the pumping was a tortious wrong, damaging the downstream proprietors (including five of the Bands) through lowering of both surface and ground levels below Henshaw.

Vista has carried on the pumping program since 1950, when a series of droughts made it necessary in order to keep up normal water service. The pumping made up the drought shortage more or less; it did not cause the total to exceed the design capacity of the canal, about 70 cfs. So, how the pumping is chargeable to Mutual cannot be perceived, conceding they knew all about it.

Whether and to what extent the pumping harms the downstream reservations caused a lot of talk at the hearing and quite a contrariety of expert testimony. This seems to be [sic] a matter of California law, not Federal, and this forum in several different senses is incompetent to adjudicate it. Recall that Henshaw is on private lands, so is the ranch

around and above it.¹ Actually there was discussed a lot of pumping by private landowners right in the valley of the Rey, hard by the reservations. Possibly all pumping dis-affects the ground water level thereabout, but resolution of that problem is too much for Mutual to be charged with, and it is quite beyond the scope of any relief affordable here under the Federal Power Act. Staff seems to agree, concluding that this forum has no control over pumping as such, and since the pumped water did not cause the canal's authorized capacity to be exceeded, "then the license is not violated." (Staff Brief of November 1974, p. 18).

But one very serious aspect remains. The 1914 contract guarantees the Rincons 6 cfs of the natural flow of the river, and it seems established and agreed on all sides that pumping as such has and does seriously affect the computations which give effect to that guarantee. See Mutual's witness, Mr. Powell, at 37Tr8011. The Rincons have been short-changed, so to speak, to the extent of 320 acre feet per year for the twenty-five years ensuing after 1950. During the hearings a completely revised formula, to take this deficiency into account, was worked out and has already been put into effect, 37Tr8014-20. Any new license will contemplate the computation by the new formula.

But what of the past 25 years? The wrong is all but admitted; the problem is jurisdiction. Staff at page 19 assembles five citations to the effect FPC has no operative law under which to award reparations or damages; we look to the future, we cannot atone for the transgressions of the past. To them one can add the Order of March 22, 1963,

¹This is the historic Warner's Ranch, scene of an insurrection in the 1850's. The title to the area is not and never has been in the United States — it was a Mexican land grant whose title was confirmed by the Treaty of Guadalupe-Hidalgo, as held in *Barker v. Harvey*, 181 U.S. 481.

in Idaho Power Company, Project No. 1971, 29 F.P.C. 572, referring to a claim by the State of Oregon for damage caused by the licensee's negligence: "... the Commission would be without authority to order the [sic] Licensee to compensate the State in this matter even if the amount were liquidated. The authority to entertain and enforce such claims under the Federal Power Act is vested in the several District Courts of the United States." (citing *Seaboard R. Co. v. Crisp*, 280 F. 2d 873.)

D. *The joint operation:*

It has been a fair matter of concern to the Department and the Bands that, while Mutual is now the sole licensee, by its contract of 1922 and its doings ever since, Mutual has at least partially turned over control, policy, operations, and responsibility to this stranger to the action, now the Vista Irrigation District. The point is well taken but the same answer applies as to the problem of the transit of Vista's water.

The contract provides for all operations to be directed by a Joint Superintendent, appointed by Vista and Mutual jointly. All employees and activities are under his direction, subject to reporting to, and control by the two boards of directors respectively, meaning severally and not jointly. It works out that the annual budget and major decisions are the province of both boards, and no order or resolution is effective until the other one has concurred in it. Finally, in case of irreconcilable difference, a third-party arbitration is provided. It is not a partnership or a joint venture; it is still Mutual's project, but Vista pays Mutual \$10,000 per year for its water passage, besides contributing handsomely to some of the capital inputs that changes have required from time to time. Mutual enters them on the books as contributions in aid of construction.

Actually, the hearing was not told of any serious problems or disagreements resulting in an impasse. It can be conjured up that Mutual has disabled itself by contract from carrying out its license responsibilities, such as upkeep, replacements, and rebuilding in case of major happening. That apprehension can be, and is hereby, quickly cured, by this re-declaration that the interposition of Vista does not relieve Mutual of anything, and it has been and remains today severally, by itself, responsible to the Commission and to the Law to see to it that its legal obligations are fully carried out, at its own expense if necessary. Otherwise, there is no reason to doubt Staff's conclusion that the license, however inaptly worded, authorized the joint operation as well as the carriage of Vista's water. The new license jointly with Vista will constitute a reformation, if such need there be.

E. *Joint Mutual and City of Escondido operation:*

The same point is made about the operating arrangement between Mutual and the City, whereby the City virtually controls and operates Mutual. That makes it, we read, a transfer of the license forbidden by section 8 of the Act.

The background is that Mutual is a water company, owning a storage and distribution system as well as the project itself — the latter is about one-third of Mutual's total investment. But the City virtually owns Mutual. That is, the City (which also for years has had a water distribution system, directly supplied with Colorado River water), owns some small share of Mutual's stock and has been trying for years to buy up all of it. So far, the City has acquired voting rights, if not ownership, to 90% of the outstanding shares.

With that leverage, the City runs it along with its own system; it is all one integrated operation. The control is manifested by the board membership — the five City Council members are (I believe *ex officio*) members of the 7-man

board of Mutual, which assures control. The Mutual employees are carried on the City payroll, so the City runs and operates Mutual's system as part of its own *except* the Project 176, which is run by the Joint Superintendent (3Tr619).

Staff doubts that this is quite kosher, but sees the arrangement as an efficient one and of no apparent damage to others. The answer is the same as before — it is Mutual that is licensed and it is Mutual that continues to bear the corporate responsibility. Besides, it is Mutual that still owns the project, to the extent any licensee has any title to works on a reservation, and Mutual is the party liable for whatever goes wrong. (Thus the Bands complain that Mutual delegated its right of entry on project lands to its co-operator, Vista, but the point is that this is only a delegation (just as if they called in a plumber or builder); it is not wrong as long as responsibility remains where the FPC put it.)

Similarly, in net effect Mutual has employed the City to carry out their project business. It is not a transfer as long as Mutual continues to bear the responsibility, as it does. Anyway, a new license will cure the defect, if defect there be.

F. Trespass and related violations claimed:

This subject came up in the original complaints, but was not included in the Interior-Bands' joint brief on compliance issues, filed in 1974. Now in final brief a number of related matters are brought out, not so much now to seek relief on them as such, but to demonstrate that the conduct of Mutual and Vista during the original license period does not put them in a favored position in the competition for a new license. They are correct that Mutual has a lot to answer for; equally, Mutual has made a lot of answers, and the most encouraging aspect is that several defects were cured while the hearings were going on. There is even some ev-

idence, perhaps intangible, of a greater spirit of cooperation between Mutual and the leadership of the Bands, some considerable want of which formerly could be noted on both sides.

For instance, it was obvious that the precise location of the access roads crossing the reservations, to get into the project, are often quite different from those shown on the 1924 maps. Not surprisingly so considering the changes in needs and methods over fifty years (for example, Mutual has devised a little tractor, like a gardener's mower, that can run the length of the canal when it is dry, hauling equipment behind on little carts, and just barely scraping under the occasional crossbridge). Not surprising too when it is shown the surveying that produced the original maps, some of them from the 1890's, now appears to have an error at some points. Not surprising too, when it is shown that so much of the reservation land, especially the upper half, is not used at all, and the cutting of new roads, whether right or wrong, is mostly an improvement, indeed has given the residents means of access for themselves, not always otherwise available.

But the fact remains that Mutual has felt free to make changes from time to time on lands that belong to someone else, and this without much effort to get the Bands' permission, nor the FPC's. The Bands' witness, engineer-hydrologist Stetson, only colors the picture somewhat when he summarized, after detailing in figures the 120 acres of Government and tribal land where trespasses seem to have occurred:

It is obvious to me that the Escondido Mutual Water Company has treated the government lands and the lands of the La Jolla, Rincon and San Pasqual Indian Reservations as if they belonged to the Escondido Mutual Water Company, or as if they existed to meet and

serve the needs of the Escondido Mutual Water Company. The Escondido Mutual Water Company has, in other words, exhibited a callous disregard of the property rights of others. It has built and used facilities on governmental and Indian land without obtaining the approval or consent [sic] of the Federal Power Commission or, to the best of my knowledge, of anyone else in a position of authority. The numerous examples of what I have called deviations obviously indicate a pattern and practice rather than a few isolated instances. (B-75, pp. 49-50).

It is hard to assay the net effect of all this when some of the lands are mountainous caverns not accessible to anybody, some more is very hilly and quite undeveloped, while some more is usable, rural residential area — some homesites back right up to canal's edge, while on the other side we saw a horse ranch, thankfully fenced off. But the question of possible damage is not relevant to a future license, however difficult it would be to prove for past periods. What counts now is that it is the Bands' land, and their right to be secure in their persons and estates, is as much protected by the Bill of Rights as Mutual's rights are protected by the license. Mutual must have reasonable access to keep the canal in being, in operation and good repair. The Bands' properties must not be invaded. The obvious accommodation is to call for mutual agreement on changes and on operations — for example, where security means a lock on a gate across an access road, the Band members who want to use the road must be given a way to open the gate. That sort of cooperation cannot be spelled out in a license by metes and bounds, but it is believed the Staff's suggested license form ^{and} conditions will require and produce such a result. It better.

One more detail illustrates why this provision cannot be more specific. At pretrial in Washington, we were told of

the operator's cottage at the diversion dam, blatantly as well as permanently located outside the fifty foot right of way, with no license at all to sanction its invasion of the tribal domain. One pictured a homesite carved out of a resident's lawn, corn field or orchard, a clear deprivation and tortious taking of valuable real estate, and it was regretted our procedures do not provide for the immediate, summary writ of ejectment the forum was asked to promulgate. It turned out, on inspection the modest cottage and carport are in a spot carved out of the side of a steep canyon, miles away from anyone, in an area so steep that, so it can be reported, only mountain goats can spryly negotiate it. (It was quite nearby that two American eagles were seen, near their mountain aerie, just above the canal and apparently unconcerned with its environmental impact.) So, it could hardly be understood why this fustian claim of trespass comprised more than a plea for the map lines to be straightened out.

Next, it is pointed out the major improvements in the 1920's were not covered by licensing procedure until 1939, meaning the new and larger diversion dam, the canal enlargement through concrete and gunite, and the like. All true; likewise the 1948 rerouting was not approved until 1958.

For all this, no damages as such seem now to be sought or expected. Interior-Bands have succeeded in demonstrating that Mutual has been much less than respectful of its regulatory responsibilities as well as of the privileges and immunities of the reservations and their residents. Perhaps the best by-product of this proceeding is the evident basis, on many intangible grounds, to expect a distinct improvement in both regards.

As a counter influence, the Staff and the forum are satisfied that, as operators of a complex mechanism and physical establishment of this improvement of the river resource

formerly for the benefit of the water users, but now to benefit the Bands and the residents as well, the managers have done creditably and well — the canal itself is well maintained; it is the object and hope of this proceeding that the canal continue for many years to serve the public interest, and this includes the Bands and their members, as well as those, whose money and enterprise are at stake.

4. *The statutory preference for cities and political subdivisions.*

In issuing new licenses upon expiration of the first one, the Commission *evidently* is to give preference, between competing applicants whose plans are equally well adapted, etc., to states and municipalities. Both the Bands and Escondido claim eligibility for this preference, the Bands under the definition of "municipality" which includes political subdivisions, of whose nature they partake.

The Staff's reply brief adequately and succinctly disposes of these off-setting claims, and is here adopted, viz.:

The Bands and Interior argue, without merit, that the Bands are entitled to preference over the other Applicants pursuant to the provisions of Section 7(a) of the Federal Power Act. (16 USC 800). They attempted to show that the Indian Bands are municipalities within the meaning of Section 3(7) of the Federal Power Act. (16 USC 796). The Act states:

- (7) municipality means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

The Bands are hard pressed to convince Staff that they meet the test of Section 3(7). They are not a political subdivision or agency of a State, nor are they in the

power business. Quite the contrary. If they receive a *non-power* license, they have consistently contended that they will not continue to operate the electrical generation equipment. It could be argued that they “utilize” power but only in the sense that they are consumers, they do not utilize it to develop additional power as a true municipality would do to compliment its generation and/or transmission and distribution operations.

Even assuming *arguendo* that the Bands meet the statutory test of a municipality, their claim is completely offset by the fact that the City of Escondido is a municipality under the laws of the State of California which is *competent* to engage in the power business. The Bands and Interior agree to this. (Bands-Interior Initial Brief, p. 203, 2nd full para.).

They also assume that Vista is a municipality, but is not an applicant. (Bands-Interior Initial Brief, p. 203, 1st full para.).

Staff agrees that Vista is not an applicant at this time, but will be one when it files its application for the jurisdictional Henshaw facilities pursuant to Commission order. There is no merit to the contention that the City is not an applicant for a new license along with Mutual as the Bands now state.

It is not necessary for Your Honor and the Commission to make a decision on the “preference” question in this proceeding. Clearly, the City of Escondido joined by Mutual in a joint application for a new 50-year license has as much right to preference, as do the Bands who seek a non-power license in opposition. Obviously, the City is a municipality while the Bands may be considered one. Their preference rights are mutually-exclusive which moots the preference issue in this proceeding. When Vista files for a license, its status as a municipality will also have the effect of

further off-setting the Bands' preference claim which they may or may not have, (footnote omitted).

5. *The San Diego Gas & Electric Company Docket (P-559):*

The San Diego Gas & Electric Company (SDG&E) is the original and present licensee for Transmission Line Project 599 [sic].¹ The license encompasses the sole line, approximately 2.4 miles in length, which connects the small powerhouse on the Rincon reservation to SDG&E's interconnected grid system. The application for a new license was filed by SDG&E on March 4, 1974, and is the only non-controversial portion of the overall case. On September 3, 1974, the Commission issued an order consolidating P-559 with the proceedings in Project 176. In addition, the Commission granted petitions to intervene by both the Rincon Band and Mutual.

Since Project 559 is the only facility connecting the Rincon powerhouse to the grid system of SDG&E, if a new license is issued for Project 176 then Project 559 should be licensed as well. The term of the Project 559 license should be for a term of 50 years to coincide with the exact license period of any license issued for Project 176. Inasmuch as there is no opposition to Staff's recommendation [sic], and in the event that a new license issues for Project 176, then Staff's proposed licensing order for Project 559 (Staff's Initial Brief 91-93) should issue. No significant new construction is required; it is a relicensing proceeding.

The line obviously crosses part of Rincon, so the Staff has inserted the usual provision for a small annual charge

¹Since March 1975, SDG&E has operated Project 599 [sic] pursuant to the terms of Annual Licenses.

for the occupation of the Indian lands proportionate to the net benefit. That will not work here because of the special arrangement for the sale of Rincon plant's power to SDG&E — the sale is not at a reasonable cost rate, such as contemplated by Section 19 of the Power Act, but is at the computed cost to SDG&E of an equal amount of power produced by its regular thermal energy generators, meaning power produced from oil. (This is the same "what the traffic will bear" approach that Mutual so decries when the Bands propose to sell water to Mutual for the cost of replacement water.) So, it would be an undue burden on the consumers in San Diego if this modicum of power were priced at the alternate cost plus any charge for the land occupied by the tie-in line. Since the Rincons benefit from the power, some of it received when the line operates in the reverse, to bring in SDG&E power, there is no occasion to add this surcharge, in the long run affecting San Diego consumers, for the power coming out of Rincon.

One other matter is related to this docket. That is an old application of the San Diego company to abandon a section of line no longer in use. It is not in controversy and should be disposed of promptly to permit the poles' early removal. Accordingly, to avoid the time lag inherent in the final effectiveness of this initial decision, the abandonment matter is to be processed separately, and the order therefor issues tomorrow.

X

MUTUAL'S WATER CANAL IS NOT A POWER PROJECT NOR IS IT LICENSABLE UNDER THE ACT

1. *Project 176 is not really a power project at all:*

In every respect the production of power by Project No. 176 is insignificant. The capacities of 520 Kw from the three generating units of The Bear Valley Powerhouse and

240 Kw from the two units of the Rincon powerhouse result in a total installed capacity for the five generating units of only 760 Kw (Ex. S-60, p. 1-1).¹ The horsepower generated by the entire project is not even the equivalent to that produced by half a dozen modern automobiles.²

In their own manner of operations and actions, Mutual and its primary purchaser, San Diego Gas & Electricity [sic] (SDG&E)³ implicitly recognize the insignificance of these power production facilities. The project is used neither for base load nor peaking. It is not dependable capacity and is considered by SDG&E to be [sic] "non-scheduled power" which is used "as supplemental energy as it is available" (Ex. S-46, Interrogatory and Answer No. 19). The capacity, (primarily during irrigation demand) does not necessarily correspond to San Diego's time of peak demand (Ex. S-10, p. 6), thus indicating that the production of power is only incidental to the larger purpose of irrigation.

Moreover, Mutual's plan of operations does not maximize the generation of power which could be achieved if the Rincon power plant were operated at its maximum capacity

¹The fall of the water which is the source of the Bear Valley power (the true subject matter of the power license) occurs only *after* it leaves Lake Wohlford, all several miles below any Indian reservation, long after it leaves the Escondido canal and 15 miles from the San Luis Rey. Even the minor diversion to the small "power" plant on the Rincon reservation is fed from a penstock which itself takes off from the canal at a point on non-Indian land (Ex. M-68). Shortly crossing the Rincon boundary, the flume continues sharply downhill in the Rincon reservation to the small power plant.

²A project of 760 Kw would produce slightly over 1000 h.p. (746 watts = 1 h.p.).

³San Diego Gas and Electric Company purchases 95% of the power generated by the Project. The remainder is sold to the United States for the use of the Rincon Indians under the 1914 contract, Ex. A-1, Attach 3-06. The 95%-5% breakdown was provided by the Band's witness, Stetson. See Ex. S-60, p. 52A, para. 2a.

on a continuous year-round basis (instead of only when their share of water is available). The total average annual generation for the entire project under this year-round scheme of operation would be 5,191,000 Kwh per year, compared to 4,075,388 Kwh which has been the actual average yearly performance since 1923. (Ex. S-10, pp. 7-8; Ex. S-60, p. 8-4)

Practically speaking, SDG&E does not rely on the project's production. As one of the company's Senior Vice Presidents stated in response to Staff's interrogatories, "[t]he loss of the power purchased from the Project would have virtually no effect upon San Diego Gas & Electric Company." (Ex. S-46, p. 1.). This is clear in light of SDG&E's total energy requirements of more than 8 billion Kwhr's of which only 1.6 million were purchased from Mutual. In other words 0.02% (two hundredths of one percent) of SDG&E's power requirements are supplied by Project No. 176.¹

The operation of the facilities is only marginally profitable. Mr. Michaels, the Utilities Director for the City of Escondido and the person currently in charge of project operations, testified concerning the Rincon plant that, if only incremental costs were accounted for, the project would just break even or perhaps lose money, but that "... if you got into all of the costs involved, why, it wouldn't be profitable . . ." (3B Tr. 362-3.) As far as the Bear Valley Power plant is concerned, he testified that while there was some profit in a wet year, in a dry year "... it is actually a loss." (3B Tr. 566).

¹These figures are for 1972 and are based on Ex. S-46, p. 1 as corrected at 39 Tr. 8273. Staff notes that 1972 was a below average year, but even if 1971 figures are used the percentages are not significantly different.

The equipment at both plants is old and most of it predates the issuance of the license by almost ten years. The record indicates that the remaining useful life of the equipment is well under 20 years. Adjusting for the time that has elapsed since the testimony was prepared, the remaining useful life of the generators that were rewound in 1969 and those that were not is 13 years and 3 years respectively. The Pelton water wheels are also considered to have a probable remaining life of 3 years except for turbine and generator No. 1 of Bear Valley which were installed in 1928, and are estimated to have a remaining life of 16 years.² (Ex. S-10, pp. 8-9). Mr. Michaels testified further that small units such as those used here are not normally replaced (3B Tr. 568). Moreover, as Staff's witness Mr. Diehl testified, replacement would be "costly" (Ex. S-10, p. 12), and Mr. Powell, Mutual's witness, estimates the replacement figure to be about \$700,000 in October 1973 dollars (Exs. M-78 at p. 368, M-95). This would result in a cost of approximately \$910 per kilowatt of installed capacity, which significantly exceeds the cost of producing power by other methods.¹

The marginal economic feasibility of the power plants underscores the insignificance of the production of power in terms of the entire project. Recognizing this, Mr. Michaels testified as follows:

"... we don't quite see the power facilities that are on that project as the only part of the project. We kind of look at it as the whole thing. And if one of the features is to operate something in which you don't

²These estimates are based on a somewhat arbitrary total useful life expectancy of 65 years for these water wheels and generators. Mr. Diehl noted that it is quite possible that, with good maintenance and timely replacements, the equipment could last indefinitely. (Ex. S-10, p. 9).

¹See for example, 34 Tr. 7176 where Staff witness, Mr. Diehl, estimated the capital cost of coal-fired steam plants to be about \$345 per kilowatt and nuclear plants to be about \$400 per kilowatt.

make very much money but it is a necessary part of the water system, why, you take a little less here and it doesn't really bother you, because in general that project is feasible or it wouldn't be continued." (3 Tr. 573)

When the power production facilities of a licensed power project become so insignificant their economic feasibility is irrelevant to the continued operation of the entire project it becomes clear that the operation cannot, by any rational definition, be considered to be a power project. Escondido's position is so clear on this that it is not only willing to take an occasional loss but is willing to accept a condition of the license that would require Escondido, in their counsel's words, ". . . to continue the operation of the power plants without regard to economic feasibility." (39B Tr. 8285). When the amount of power is as insignificant as it is here, and when it is not economically sound to continue to produce power then, whatever the project is, it is clearly *not* a power project.

All of this is not to say, however, that the small amount of power produced by these plants is intrinsically unimportant,² but rather that the power which is generated is not only considered incidental by the main purchaser of the power but is also quite incidental to the predominate purposes of the project. The earliest map filed by Escondido Irrigation District pursuant to 43 U.S.C. § 947 clearly stated the non-power purpose of the project. Directly above the signature of A.W. Wohlford, the company's President, appears the following language, "The Right of Way of this

²The replacement energy required to match Escondido Mutual's average annual production of 4,075,000 Kwh per year (from 1923 to 1970 inclusive) would consume about 6,340 barrels of fuel oil or 37,800,000 cubic feet of natural gas per year in non-renewable resources, as opposed to the renewable water power of this Project (Ex. S-10, pp. 12-13).

Canal is desired for the sole purpose of irrigation." (Ex. A-1, Attach. 11-03). The secondary status of the power development purpose was laid out no more explicitly than in the 1905 Articles of Incorporation of the Escondido Mutual Water Company (Ex. A-1, Attach. 3-04) where it is stated:

That the purposes for which it is formed are: To supply to its stockholders only, at cost and not for profit, water for any and all beneficial uses; *secondarily and incidentally, to develop water power* and to apply the same to the generation of electric power for any and all beneficial uses, . . . (emphasis added)

Nor was the Federal Power Commission unmindful of the comparatively insignificant role of the production of power to this project. As recorded in the minutes of a 1926 meeting, in which the Commission advised the General Land Office that it had no objection to San Diego Water Company's application for enlargement of the Henshaw reservoir, FPC Executive Secretary O.C. Merrill reported that:

"The reservoir is constructed to furnish water for irrigation use and the water power resources involved are comparatively insignificant. The irrigation project is consistent with the most beneficial development of the water resources and insofar as the use for water power may conflict with the use of irrigation, the former should, because of its relatively small importance, give way to the latter." (Ex. S-6, p. 5)

The Commission then voted to concur in Henshaw's right-of-way and the proposed use of public lands for the location of the irrigation reservoir as being in accord with the plan best adapted to a comprehensive scheme of utilization of the water resources involved for power development and other beneficial public uses.

That the Commission issued a license for Mutual's project in 1924 does not preclude a re-evaluation of that determi-

nation in light of the changed circumstances and the intervening 50 years; indeed, now that the license has expired we would be remiss were we not to do so. One significant change relevant to the analysis here is the determination by Congress in 1962 to increase the size of what was to be considered a "minor" project under the Act (§ 10(1) as amended by Act of September 7, 1962, 76 Stat 447). This statutory change alone altered the status of Project No. 176 from a "major project" to a "minor project," thus making practically all the power requirements and restrictions of the Power Act subject to FPC waiver, section 10(i). Further minimizing the significance of the power production aspect of the Project is the fact that Mutual's new application does not include the third power plant (with a capacity of 123.8 Kw) that was authorized in the original license but never built (Exs. S-10, pp. 19-20; M-169 at pp. 8&11; Tr. 7164-7165). So, the proposal that was received in 1924 to be a major project has in the interim been reduced not only in absolute size by the decision not to build the entire capacity originally authorized but also in relative size by the Congressional redefinition of what constitutes a minor project.

Furthermore, the statutory language of § 23(b) appears to contemplate the issuance of licenses only to projects, "for the purpose of developing electric power." The production of power by Project No. 176, however, can only be termed *de minimis* in light of this project's predominant and clearly defined purpose of irrigation, also the equally well-defined subsidiary role of power generation, and especially in light of the miniscule amount of power produced, both in absolute terms and relative to other projects.¹

¹Although the Commission has issued licenses where the primary purpose of the project was not the generation of electric power, in those cases the amount of power produced has been of major proportions (i.e. amounts in excess of the 2000 horsepower maximum for minor projects specified in §10(i)). In City and County of Denver (Project No. 2035) 10 FPC 766 (1951) a 10,500 hp powerhouse was licensed even though

2. *Irrigation projects are licensed under other laws:*

Apart from the regime of the Federal Power Act, there are ample statutory provisions which provide a comprehensive scheme for obtaining rights-of-way and easements through public lands and reservations for projects which exist primarily for irrigation or drainage purposes and only incidentally concern the development of power.

Rights-of-way through public lands and reservations for "reservoirs, canals, and laterals" are granted, under 43 U.S.C. § 946, "to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage" which has met certain filing requirements. The statute calls for the company to file a map of its canal or ditch and reservoir with the proper officer as designated by the Secretary of the Interior (43 U.S.C. §947). The right-of-way provisions contained in 43 U.S. [sic] §946-949 are not limited to canal ditch companies or drainage districts but are applicable, by virtue of §948, to ". . . all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals . . ."

the project was designed primarily to supply water to Denver for municipal purposes. Similarly, in Department of Water Resources of the State of California and City of Los Angeles Department of Water and Power (Project No. 2426) 51 FPC 529 (1974) the Commission authorized the licensing of certain individual facilities out of the entire proposed project where the project's primary purpose was the transportation of water, with a secondary purpose of power production. But there the proposed total capacity was a massive 1,530 mw making the project one of the largest hydroelectric plants licensed by the FPC; at the time of the initial decision it was exceeded in size by only two operating licensed projects (51 FPC at 549). Moreover, upon remand on other grounds, the Administrative Law Judge found the power development installations to be "essential components" of the program. Department of Water Resources of the State of California and City of Los Angeles Department of Water Power [sic], Project No. 2426. Initial Decision (April 29, 1977) mimeo at 12).

Whereas the right-of-way itself is to be used only "for the purpose of said canal or ditch" (§949) the statutory scheme specifically contemplates the need for additional lands for dwellings or other buildings for the convenience of those engaged in managing or caring for the facility and §950 authorized Interior to grant permits or easements for the use of up to five acres of the adjoining ground.

That the Secretary of the Interior (and not the Federal Power Commission) should bear the responsibility for authorizing rights-of-way for projects with a primary purpose of irrigation is the net effect of several other statutes as well. The Secretary of the Interior may grant rights-of-way for "all purposes" across any Indian lands pursuant to 12 U.S.C. §323 *et. seq.*

Specifically to the point here, Congress did not intend the incidental development of power to remove a water project from the statutory regime in Title 43 — see §951, which provides that the rights-of-way approved under §946-949 ". . . may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation or drainage." More specifically §959 provides, in relevant part:

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights-of-way through the public lands, forest, and other *reservations* of the United States . . . for *electrical plants, poles, and lines, for the generation and distribution of electrical power . . . and for canals, ditches, pipes and pipelines, flumes, tunnels or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation, or the supplying of water for domestic, public, or any other ben-*

eficial uses . . . (Emphasis added).¹

In light of the comprehensive statutory apparatus discussed above, as codified in Titles 25 and 43, U.S.C., it is pretty plain that Congress contemplated incidental power facilities in the licensing of which the Federal Power Commission would not play a role,² that, rather, the Secretary of the Interior alone would authorize the use of Indian and public lands for the development of water resources, where the predominant purpose, the primary objective, of such development is not the production of power.³

The result:

Even if Project 176 was a power project in 1924, as the Commission evidently assumed, it is not one now and does not belong under the Federal Power Act at all. At a dozen points throughout the statute, and in its voluminous history, it is made evident that the subject matter is power projects, not irrigation schemes. Incidental benefits to commerce, navigation, recreation, and "other beneficial public uses" are provided for, indeed demanded for a "comprehensive development," but it is just as clear that electric power is the primary purview, the real subject of the law. (*Chemehuevi Tribe v. FPC*, 420 U.S. 395, 405 (1975)) That is

¹It should be noted that a proviso to this section states that any permission given by the Secretary of the Interior under this section ". . . may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." 43 U.S.C. §959.

²Permits obtained pursuant to these sections would of course not relieve a person from the requirement of applying for a license under the Federal Power Act where interstate commerce or navigable waters were affected. *Montana Power Co. v. FPC*, 185 F.2d 491 (1950), *cert. denied* 340 U.S. 947 (1951).

³There was even some talk at the hearing to the effect that The Bureau of Indian Affairs and Indian Tribes operate many irrigation projects, and as part of those irrigation projects they generate hydro-electric power not under license by the Federal Power Commission." [sic] 39 Tr. 8290

why an FPC license is required for, and need issue to, only those projects which are "for the purpose of developing electric power" (Section 23). This one is not and never was. (Even if it was a power project in 1924, (a) one of the three planned power houses has never been built, and (b) the recent change in the law reclassifies it to minor project status).

It is the view that the Escondido project was not truly understood in 1924, that it was not and is not a project for the purpose of developing electricity, that the license was improvidently issued, in fact it was issued without jurisdiction and, finally, that it is not a power project now and no license by the FPC is called for, required, or within the power of FPC to issue to anyone. All the applications should be dismissed for lack of jurisdiction.

This does not leave Mutual a trespasser. Its canal was built in 1895 under an Interior Department permit or license under the Act of 1891. The power installation, such as it is, was added in 1916. All that has happened since is its considerable enlargement and perhaps some minor rerouting. The old permit is still in effect. If some small amendments are needed, the Department can handle them speedily, since this extensive record is before its officials who represented the Secretary here. Actually, Mutual's brief assured us the old permit is still in order, and it was invoked at one point here (Brief, p. I-13). That is where this whole matter belongs; the Federal Power Commission need not and should not be involved at all.¹

¹This does not overlook section 15, granting annual licenses upon expiration after fifty years, until a new license issues to someone. Manifestly, this contemplates lawful original licenses, not one issued incorrectly, unlawfully, or without jurisdiction.

XI

ACCORDINGLY, upon this entire record and in the light of the entire proceeding, but subject to review by the Commission, it is found that, if and when a license be issued for another term for Project 176, it should be issued to Mutual, the City and Vista and subject to the stipulations and conditions set forth above and those recited in the Staff's brief in this cause as filed in July, 1976, but that, for the reasons stated in chapter X, the operation now going on and proposed for licensing is not a power project licensable under the Federal Power Act, in view of which it is —

ORDERED that:

In Docket No. P-176, the application of Mutual-City is dismissed;

In Docket No. E-7562, the complaint of the Secretary of the Interior is dismissed and the responsibility for the issue of any permits or rights of way required in the premises is the Secretary's, not the Commission's;

In Docket No. E-7655, the investigation of Vista is closed, subject to the requirement that Vista join in any FPC license that may hereafter issue; and

In Docket No. P-599, the application of San Diego Gas & Electric Company is dismissed, subject to reopening and approval if and when any FPC license may issue with respect to Project No. P-176.

/s/ W. L. Ellis

W. L. Ellis

Administrative Law Judge, Presiding

[Attached Project Map Deleted]

Excerpt From Appendix D to Bands' Brief on Exceptions to Initial Decision Filed September, 1977 [Memorandum on Water Power Legislation From O. C. Merrill, Chief Engineer, Forest Service, Dated October 31, 1917, pp. D-2 - 6 (line 24); D-16 (lines 22-24)].

MEMORANDUM ON WATER POWER LEGISLATION

The principles which it is believed should govern the Federal administration of water powers and which should serve as a foundation of Federal legislation, are as follows:

1. *Public Control*

Continued public ownership and control of power sites on public lands and of power privileges on navigable rivers.

2. *Term Licenses*

The utilization of public power sites and power privileges under term licenses for periods not to exceed 50 years, unalterable during their term, issued in accordance with general regulations at the discretion of the issuing authority.

3. *Renewal of Licenses*

Licenses at expiration to be renewable to original licenses under then existing law and with such conditions as the public interests may then require, subject to the right of the United States to take over the property or to transfer it to a State or municipal corporation applying therefor.

4. *Recovery by Public*

If taken over by the public or a new licensee, the license and all properties immediately and necessarily dependent thereon to be transferred upon payment to original licensee of fair value not to exceed cost.

5. *No Over Capitalization*

No valuation for rate-making purposes of properties held under license or immediately dependent thereon at more than actual necessary cost to licensee.

6. *A Rental Charge*

A fair compensation to the public for the privileges granted, the rate and principles of periodic readjustment to be fixed in the license.

7. *Administration*

A coordinated administration of all water-power activities of the Federal Government by a Federal Power Commission consisting of the Secretaries of Agriculture, Interior and War with a single appointed executive to act under the direction of the Commission.

8. *Cooperation*

Cooperation between the Government and the electric power industry for the purpose of increasing the National power supply to meet war demands and of raising the proportion of water power in order to lessen the demand for coal and to conserve the fuel oil supply.

In order to put the preceding principles into effect, it is recommended that legislation include the following:

1. A general water power bill covering both public lands and navigable streams.

Although in general the Federal Government exercises control over the public lands by right of ownership and over the navigable rivers by right of sovereignty [sic], the fundamental principles applicable in both cases are identical. There are the same public rights to be safe-guarded and the same interests of the investor to be secured. With a single bill this identity can be preserved; with separate bills it will be difficult, if not impossible. A unified administration can

also be more readily secured under a single bill.

2. Administration of all water powers under the control of the Federal Government by a Federal Power Commission consisting of the Secretaries of Agriculture, Interior and War with a single appointed executive to act under the direction of the Commission, the Commission to have also a Secretary, Attorney and such other officers and experts as may be necessary but to coordinate and utilize as far as practicable the existing organizations of the three Departments.

A coordinate administration of the water power activities of the three Departments will have distinct advantages, particularly in the establishment and maintenance of a common policy. It will prevent duplication of work and will give power users one authority instead of three with which to deal. Such a form of administration will not interfere with the special responsibilities which the several Departments have over the National Forests, public lands and navigable rivers.

For the most efficient administration, and particularly for actively cooperating with the power industry in the present emergency, the Commission should have a working organization of its own, consisting of an executive officer responsible to the Commission, acting under its general authority, and in accordance with policies which it may prescribe, a Secretary, an Attorney, and such other officers and experts as may be necessary; but should, as far as practicable, utilize the existing organization, officers and experts of the three Departments.

3. Commission to have authority to issue regulations for the administration of the Act, to grant permits for investigative purposes, for a period not to exceed two years, and to license the occupancy of public lands and the utilization of navigable rivers for water-

power development for periods not to exceed fifty (50) years, such licenses to be issued at the discretion of the Commission and to be unalterable for their term. The Commission also to have authority to investigate power sites and power markets, to collect data of the power industry and its relation to other industries, and to cooperate with public or private agencies for the purpose of meeting war time demands for power, and for increasing the use of water power in order to lessen the demands for coal and to conserve the fuel oil supply.

It is desirable that legislation be expressed in general terms and that details be prescribed by regulations issued by the Commission, such regulations to have uniform application to the public lands, the National Forests, and other reservations and to navigable rivers.

It is important that the Commission be "authorized" and not "directed" to issue licenses to applicants, otherwise it will not be possible to prevent a single applicant from obtaining licenses for more sites than can be utilized in an attempt to secure control of available sites and to monopolize the opportunities for water-power development in a given territory.

The issuance of short-term permits which will maintain an applicant's priority while making the necessary surveys and investigations is required as a measure of protection for the applicant against those who, hearing of his investigation, might endeavor to anticipate his application to the Commission in order either to embarrass his undertaking or to be paid for withdrawing.

It is believed that a license period of fifty years will be adequate if power provisions are made for taking care of the properties at the termination of the license, if the conditions under which licenses are held are expressed therein,

and if the license will not be subject to administrative or legislative alteration during its term.

It is believed that a Commission acting for the Federal Government and representing the combined water-power interests of the several Departments could render substantial assistance in a movement toward the greater utilization of water powers, particularly at the present time when there must be a considerable expension [sic] of the power supply to meet the demands of war industries. This assistance might be in the form of securing data on location, capacity, cost and relation to markets of available power sites; of promoting the interconnection of lines and interchange of power between adjacent markets in order to secure a more efficient utilization of the supply; of encouraging the substitution of water power for steam power in order to lessen the demands on the coal and fuel oil supply; and of reports upon the relative importance of proposed developments in the event it should become necessary to determine financial priorities between the various industries, or within the electric power industry itself.

4. Licenses for power sites within the National Forests to be subject to such provisions for the protection of the Forests as the Secretary of Agriculture may deem necessary. Similarly, for parks and other reservations under the control of the Departments of the Interior and of War. Plans of structures involving navigable streams to be subject to the approval of the Secretary of War.

This provision is for the purpose of preserving the administrative responsibility of each of the three Departments over lands and other matters within their exclusive jurisdiction.

* * *

/s/ O.C. Merrill

Chief Engineer, Forest Service.

October 31, 1917.

Order Allowing Certiorari Filed October 17, 1983.

Supreme Court of the United States.

No. 82-2056.

Escondido Mutual Water Company, et al., Petitioners,
v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands
of Mission Indians, et al.

ORDER ALLOWING CERTIORARI. Filed October 17, 1983.

The petition herein for a writ of certiorari to the United
States Court of Appeals for the Ninth Circuit is granted.

No. 82-2056

Office Supreme Court, U.S.

FILED

AUG 24 1983

ALEXANDER L. STEVENS,
CLERK

In The
Supreme Court of the United States
October Term, 1983

—○—
ESCONDIDO MUTUAL WATER CO., et al.,
Petitioners,
vs.

LA JOLLA BAND OF MISSION INDIANS,
FEDERAL ENERGY REGULATORY COMMISSION,
SECRETARY OF THE INTERIOR, et al.,
Respondents.

—○—
On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit

—○—
**BRIEF IN OPPOSITION OF RESPONDENTS LA
JOLLA, RINCON, SAN PASQUAL, PAUMA AND
PALA BANDS OF MISSION INDIANS**

—○—
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QUESTIONS PRESENTED

1. Whether, as part of a new license for a project whose primary and essential purpose is the conveyance of water, the Federal Energy Regulatory Commission is authorized to grant rights of way for water conveyance facilities without the consent of the affected Indian Bands across three Indian Reservations established pursuant to the Mission Indian Relief Act of 1891, 26 Stat. 712.

2. Whether pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), a license issued by the Federal Energy Regulatory Commission must be subject to and contain the conditions that the Secretary of the Interior deems necessary for the adequate protection and utilization of Indian Reservations.

3. Whether Indian water rights are reservations within the meaning of Section 3(2) of the Federal Power Act, 16 U.S.C. § 796(2), and qualify for the protection afforded reservations by Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e).

TABLE OF CONTENTS

	Pages
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
Argument:	
Introduction and Summary	4
I. The Court of Appeals' Decision Gives Effect to the Express Terms of the Federal Power Act and the Mission Indian Relief Act.	5
II. There are No Legal Issues that Warrant Review.	9
A. Divided Authority.	10
B. Alleged Conflicts.	13
C. Administrative Construction.	17
III. The Decision Below Affects Few, If Any, Hydro- electric Projects.	21
Conclusion	27

TABLE OF AUTHORITIES

CASES:	Pages
Andrus v. Glover Construction Co., 446 U. S. 608 (1980)	6
Arizona Power Authority, 39 FPC 955 (1968)	18
Bowman v. Texas Educational Foundation, 454 F. 2d 1097 (5th Cir. 1972)	9
Chemehuevi Tribe of Indians v. FPC, 489 F.2d 1207 (1973), <i>reversed on other grounds</i> , 420 U. S. 395 (1975)	12
Chemehuevi Tribe of Indians v. FPC, 420 U. S. 395 (1975)	8, 12
Colautti v. Franklin, 439 U. S. 379 (1979)	6
Creek Nation v. United States, 318 U. S. 629 (1943)	7
First Iowa Hydro-Electric Cooperative v. FPC, 328 U. S. 152 (1946)	13
FPC v. Idaho Power Company, 344 U. S. 17 (1952)	14
FPC v. Oregon, 349 U. S. 435 (1955)	13, 14, 25
FPC v. Tuscarora Indian Nation, 362 U. S. 99 (1960)	15
Greene County Planning Bd. v. FPC, 528 F. 2d 38 (2nd Cir. 1975)	10
Lac Courte Oreilles Band v. FPC, 510 F. 2d 198 (D. C. Cir. 1975)	8, 10, 16, 20, 21, 23
McEvoy v. United States, 322 U. S. 102 (1944)	6
Montana Power Company, 5 FERC ¶61,126 (1978)	23
Montana Power Company v. FPC, 298 F. 2d 335 (D. C. Cir. 1962) (Montana I)	16

TABLE OF AUTHORITIES—Continued

Pages

Montana Power Company v. FPC, 445 F.2d 739, (D. C. Cir. en banc 1970), <i>cert. denied</i> , 440 U. S. 1013 (Montana II) _____	16, 17
Montana Power Company v. FPC, 459 F.2d 863 (D. C. Cir. 1972), <i>cert. denied</i> , 408 U. S. 930 (Montana III) _____	16, 17
Morton v. Mancari, 417 U. S. 535 (1974) _____	9
Northern States Power Co., Order Denying Late- Filed Petitions to Intervene dated May 17, 1983 _____	23
Northern States Power Company, 50 FPC 753 (1973) _____	20, 21
Pacific Gas & Electric Co., 53 FPC 523 (1975) _____	13, 20
Pacific Power and Light Co. v. FPC, 184 F.2d 272 (D. C. Cir. 1950) _____	22
Pigeon River Lumber Co., 1 FPC 206 (1935) _____	17, 18
Radzanower v. Touche, Ross & Co., 426 U. S. 148 (1976) _____	9
United States ex rel. Chapman v. FPC, 345 U. S. 153 (1953) _____	14
United States v. New Mexico, 438 U. S. 696 (1978) _____	24
United States v. Public Utilities Commission, 345 U. S. 295 (1953) _____	12
United States v. Reeb, 433 F.2d 381 (9th Cir. 1970) _____	7
United States v. Truckee-Carson Irrigation Dis- trict, 649 F.2d 1286 (9th Cir. 1981), <i>reversed</i> <i>on other grounds, sub nom. Nevada v. United</i> <i>States</i> , — U. S. — (No. 81-2245, June 24, 1983) _____	15

TABLE OF AUTHORITIES—Continued

	Pages
United States v. Winnebago Tribe of Indians, 542 F. 2d 1002 (8th Cir. 1976)	16
Watt v. Alaska, 451 U. S. 259 (1981)	9
Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U. S. 609 (1973)	6
White Mountain Apache Tribe v. Bracker, 448 U. S. 136 (1980)	13

STATUTES:

A. FEDERAL POWER ACT

Section 3(1), 16 U.S.C. § 796(1)	24
Section 3(2), 16 U.S.C. § 796(2)	6, 7, 15
Section 4(e), 16 U.S.C. § 797(e)	<i>passim</i>
Section 4(f), 16 U.S.C. § 797(f)	17
Section 5, 16 U.S.C. § 798	17
Section 9(b), 16 U.S.C. § 802(b)	14
Section 10(a), 16 U.S.C. § 803(a)	6, 26
Section 10(e), 16 U.S.C. § 803(e)	14, 16, 23
Section 10(g), 16 U.S.C. § 803(g)	6, 15, 26
Section 11(a), 16 U.S.C. § 804(a)	10
Section 15, 16 U.S.C. § 808	19
Section 15(a), 16 U.S.C. § 808(a)	1, 10
Section 18, 16 U.S.C. § 811	11
Section 23(b), 16 U.S.C. § 817	7
Section 26, 16 U.S.C. § 820	11
Section 27, 16 U.S.C. § 821	14

TABLE OF AUTHORITIES—Continued

	Pages
Section 29, 16 U.S.C. § 823	8, 9, 24
Section 30, 16 U.S.C. § 823a	11, 12, 26
Section 313(b), 16 U.S.C. § 825l(b)	4, 10, 25
 B. OTHER LAWS	
16 U.S.C. §§ 661 <i>et seq.</i>	12
16 U.S.C. § 2705	12, 26
25 U.S.C. § 476	18
26 Stat. 712 (Mission Indian Relief Act of 1891)	2, 7, 8, 9, 16, 24
44 Stat. 453, 465 (1926)	23
45 Stat. 200, 212-13 (1928)	23
78 Stat. 982 (1964)	19, 20
 OTHER AUTHORITIES:	
<i>Hearings on Federal Protection of Indian Resources Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judi- ciary, 92d Cong., 1st Sess. (1972)</i>	21, 22
H. R. Rep. No. 90-1643, 90th Cong., 2d Sess. (1968)	19, 20
Public Land Law Review Commission, <i>One Third of the Nation's Land</i> 154 (GPO 1970)	20

No. 82-2056

In The
Supreme Court of the United States
October Term, 1983

ESCONDIDO MUTUAL WATER CO., et al.,
Petitioners,
vs.

LA JOLLA BAND OF MISSION INDIANS,
FEDERAL ENERGY REGULATORY COMMISSION,
SECRETARY OF THE INTERIOR, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit

**BRIEF IN OPPOSITION OF RESPONDENTS LA
JOLLA, RINCON, SAN PASQUAL, PAUMA AND
PALA BANDS OF MISSION INDIANS**

STATEMENT OF THE CASE

The license for Project No. 176 was issued to the Escondido Mutual Water Company in 1924 for a fifty year term. The license authorized, *inter alia*, the use of the lands of the La Jolla, Ricon, and San Pasqual Indian Reservation for water conveyance facilities. Since 1974, the project has continued to operate pursuant to annual licenses issued pursuant to Section 15(a) of the Federal Power Act (FPA), 16 U.S.C. § 808(a). Pet. App. 2, 5.

The primary and essential purposes of the project is the conveyance of water from the San Luis Rey River to

Lake Wohlford. Power production is incidental. Pet. App. 338. The amount of power generated by the project is "*de minimus*," "not even the equivalent to that produced by half a dozen modern automobiles." Pet. App. 13-14. The diversion and conveyance of the waters of the San Luis Rey River adversely affects the water supply of six downstream Indian reservations that were established pursuant to the Mission Indian Relief Act (MIRA) of 1891, 26 Stat. 712. Pet. App. 4-5, 9, 23.

The respective water rights of the Indian Reservations and the petitioners are the subject of separate litigation pending before the United States District Court for the Southern District of California. Pet. App. 7. All parties agree that the Federal Energy Regulatory Commission (hereinafter "Commission") lacks jurisdiction to adjudicate those rights. Pet. App. 99, 364. Owing to the obvious and close relationship between the license for Project No. 176 and the pending water rights adjudication suit, the Commission imposed a condition in the new license to the petitioners that reserved authority in the Commission "to modify this license in any manner considered appropriate in the light of the final disposition of that litigation." Pet. App. 10, 105-08, 259, 362. The areas currently being served with water from Project No. 176 have an available alternative supply. Pet. App. 124-27.

Throughout the lengthy relicensing proceedings before the Commission, *see* Pet. App. 72-73, the Secretary of the Interior recognized the importance of his power to impose conditions to insure the adequate protection and utilization of Indian Reservations under FPA Section 4(e), 16 U. S. C. § 797(e). The Secretary was careful to insure that

all parties would have ample opportunity to be heard, to oppose, or to suggest modifications in those conditions.

Initially, when the tentative conditions were submitted, the Secretary expressly stated that they were subject to modification based on the administrative record as it developed. JA 2663.¹ Subsequently, all of the parties, including the petitioners and the Commission Staff, were provided an opportunity to comment on the conditions. JA 1710-51. Then three high-ranking Interior Department officials, including the Solicitor of the Department and the Commissioner of Indian Affairs, appeared before the Administrative Law Judge and engaged in a dialogue concerning the Secretary's conditions with all parties, including the Commission Staff. JA 1771-1908a. At that time, the Secretary's representatives agreed to modify certain conditions and to reexamine others. JA 1784, 1789-92, 1876-83. The Secretary subsequently submitted his final revised conditions which included detailed explanations of the law and facts on which they were based as well as responses to the questions and concerns that had been raised by the parties and the Commission Staff. JA 2664, 2681.²

No one challenged the Secretary's conditions on the grounds that they are not necessary for the adequate protection and utilization of the Indian Reservations or that they are unreasonable, arbitrary, or capricious *when judged*

¹"JA" refers to the eleven volume Joint Appendix that was filed with the Court of Appeals.

²By contrast, the conditions that the Commission substituted for the Secretary's made their first appearance when the Commission issued its decision in 1979, long after the close of evidence.

by that standard. The Commission and the petitioners did contend that the conditions should not be included in the license because they are contrary to their conceptions of the public interest or because they are inconsistent with the petitioners' plans for operating the project. *See, e.g.,* Pet. App. 18, 143, 147, 150-51.

The Court of Appeals held that the conditions which the Secretary "deems necessary for the adequate protection and utilization" of the reservations must be included in the license issued by the Commission. It also expressly held that the Secretary's conditions must be reasonable and that their reasonableness is subject to review in the Court of Appeals pursuant to FPA § 313(b), 16 U.S.C. § 825l(b). Pet. App. 24-25, *modified*, Pet. App. 32-33. *See also*, Pet. App. 39-40 (dissenting opinion).

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ARGUMENT

Introduction and Summary

The decision below does not warrant review. There is no conflict in the circuits. Two of the three questions on which the petitioners seek review are limited to the unique facts and circumstances of this case. The third issue, the effect of the conditions that the Secretary of the Interior deems necessary for the adequate protection and utilization of reservations, is governed by the explicit language of the statute from which there is no reason to depart. Contrary to the petitioners' contentions, the decision below does not conflict with any decision of this Court

and, what is more, it is entirely consistent with three other federal appellate decisions.

Furthermore, the Ninth Circuit's decision is interlocutory; the case was remanded back to the Commission for further proceedings. In addition, it is only one part of a larger controversy between the parties. The complex issues involving their respective water rights, which the Commission recognized ultimately could have a crucial bearing on its license, are still pending before the federal district court. Under the Ninth Circuit's judgment, the Commission and the District Court now will be able to coordinate the resolution of the interrelated issues that are committed to their respective jurisdictions. In this double interlocutory posture, review by this Court at this time plainly would be premature.

I. The Court of Appeals' Decision Gives Effect to the Express Terms of the Federal Power Act and the Mission Indian Relief Act.

The reservation proviso to Section 4(e) of the Federal Power Act, 16 U. S. C. § 797(e), is fundamental to all three holdings of the Court of Appeals that are challenged by the petitioners. The proviso qualifies the Commission's authority to issue hydroelectric licenses involving federal reservations by stating:

That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose, for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

The Court of Appeals held that this unambiguous language means what it so plainly says; the Commission's licenses "shall be subject to and contain" the Secretary's conditions. Pet. App. 22-25. It rejected the petitioners' argument that the Secretaries' powers under the reservation proviso should be subordinated to the Commission's responsibilities under FPA Section 10(a), 16 U.S.C. § 803(a). Any other result would be contrary to all of the applicable canons of construction: that effect must be given to all provisions of a statute if at all possible, *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973); that a general provision will not control or nullify a matter that is specifically dealt with in another part of the statute, *McEvoy v. United States*, 322 U.S. 102, 107 (1944); and that courts should not adopt an interpretation that would render any provision of a statute superfluous, *Andrus v. Glover Construction Co.*, 446 U.S. 608, 618 n.19 (1980); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). The Court of Appeals' holding is further buttressed by FPA Section 10(g), 16 U.S.C. § 803(g), which subjects licenses to "such other conditions not inconsistent with the provisions of this Act as the Commission may require." Thus, the Commission's conditions cannot supercede the powers vested in the Secretaries under Section 4(e).

The Court of Appeals also held that Indian water rights are subject to the protection afforded by the reservation proviso. They are clearly encompassed within the definition of "reservations" set forth in FPA Section 3(2), 16 U.S.C. § 796(2), "interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws,"

or "interests in lands acquired and held for any public purposes." Pet. App. 25-26, 380.³

No one—neither the petitioners, the *amicus curiae*, nor the Court of Appeals' dissenter—offers any construction of the actual words of FPA Sections 4(e) and 3(2) that could possibly lead to any other conclusions.

The third issue raised by the petitioners involves the relationship between the Federal Power Act and the Mission Indian Relief Act (MIRA). Section 8 of MIRA, Pet. App. 16-17, 379-80, provides that private parties can obtain rights of way for water conveyance facilities across MIRA Reservations by entering into a contract with the Indian owners (tribal or individual) which must be approved by the Secretary of the Interior. Pet. App. 16-20⁴ The Court of Appeals held that the specific procedure set

³FPA Section 23(b), 16 U.S.C. § 817, provides additional support for the lower court's holding that Indian water rights are subject to the protection afforded by the reservation proviso. In defining the scope of the Commission's jurisdiction, Section 23(b) exempts projects on non-navigable waters that would not affect the interests of interstate or foreign commerce only "if no public lands or reservations are affected." Thus, Section 23(b) shows that Congress did not intend to limit the scope of the reservation proviso to projects physically located within reservations.

⁴Petitioners point out that Section 8 provides that any citizen, firm, or corporation "may contract" with the Indian Bands for the right to construct ditches or canals across tribal lands and suggest that this phraseology is significant. Pet. 7 n. 13. In context, however, the use of the permissive verb "may" rather than the mandatory "shall" obviously means that it is up to the Bands to decide whether to exercise the authority vested in them by Section 8. See *Creek Nation v. United States*, 318 U. S. 629, 639 (1943); *United States v. Reeb*, 433 F. 2d 381, 383 (9th Cir. 1970).

forth in Section 8 governs the acquisition of the canal rights of way sought by the petitioners for their water diversion project.

In response to the contention that Section 8 has been nullified by FPA Section 29, 16 U.S.C. § 823, which repeals "[a]ll Acts or parts of Acts inconsistent" with the FPA, the Court held that the two laws are not inconsistent because the reservation proviso to Section 4(e) manifests Congress' intent to preserve preexisting Indian rights. Pet. App. 21. The same result was reached in *Lac Courte Oreilles Band v. FPC*, 510 F. 2d 198, 210-12 (D.C. Cir. 1975). Petitioners cannot and do not explain how a statute that expressly prevents any interference with the purposes of Indian reservations can somehow result in the abrogation of rights and powers that Congress deemed necessary for their protection.

Moreover, this is not a suitable case for determining whether any pre-1920 statutes that define or vest powers in Indian tribes are repealed by FPA Section 29. As noted *supra* at 1-2, the primary purpose of Project No. 176 is the diversion and conveyance of water; power is clearly an incidental and secondary function. Section 8 of MIRA is the specific statute that governs the acquisition of rights of way for water conveyance facilities across Mission Indian Reservations. The principal purpose of the Federal Power Act, by contrast, is "licensing the construction, operation and maintenance of facilities for the development of [hydro]electric power. . . ." Pet. App. 338. *See also*, Pet. App. 145; *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 405 (1975) (FPA's underlying purpose is "the comprehensive development of water power.") Accord-

ingly, the issuance of canal rights of way would be governed by MIRA Section 8, because its provisions are more closely associated with the specific substance of this particular controversy, even if FPA Section 29 repeals "inconsistent," pre-1920 Indian statutes insofar as they may apply to projects whose primary and essential purpose is the development of hydroelectric power. *Radzanower v. Touche, Ross & Co.*, 426 U. S. 148, 153 (1976); *Morton v. Mancari*, 417 U. S. 535, 550-51 (1974); *Bowman v. Texas Educational Foundation*, 454 F. 2d 1097, 1101 (5th Cir. 1972). The result reached by the Court of Appeals, applying Section 8 of MIRA to the use of the Indian lands for water conveyance facilities (*see* Pet. App. 132), while requiring a Commission license for the generation of hydroelectric power, Pet. App. 21, is also supported by the rule that the Court will construe two statutes in a manner that gives effect to both while preserving their sense and purpose. *Watt v. Alaska*, 451 U. S. 259, 266-67 (1981).

The Court of Appeals' application of the unambiguous provisions of MIRA and the FPA to the peculiar facts of this case is clear and straightforward. It is only by ignoring the reservation proviso that any other result can be reached.

II. There are No Legal Issues that Warrant Review.

The Petition for Certiorari claims that the decision below merits review because: (i) it sanctions divided authority over hydroelectric licensing rather than subjecting all such matters exclusively to the Commission; (ii) it conflicts with several decisions of this Court; and (iii) it is

inconsistent with prior administrative construction.⁵ All of these allegations are plainly mistaken.

A. Divided Authority.

The petitioners' contention that Congress intended the Commission "to be the single agency responsible for administering national water power development" (Pet. 15) is refuted by an examination of the express terms of the Federal Power Act. In addition to the reservation proviso to Section 4(e), 16 U. S. C. § 797(e), several other provisions of the Act explicitly vest authority over various aspects of the licensing process in other federal officials.

For example, immediately following the reservation proviso, Section 4(e) states:

Provided further, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army.

Pet. App. 381. Similarly, FPA Section 11(a), 16 U. S. C. § 804(a), authorizes the Commission to require licensees to construct improvements for navigation purposes "in

⁵The petitioners also claim that the reservation proviso does not apply to new licenses, Pet. 17, although that issue is not listed in the "Questions Presented for Review." Consideration of that issue is foreclosed because it was not raised by the petitioners in their Petition for Rehearing to the Commission. FPA § 313, 16 U.S.C. § 825 I; Greene County Planning Bd. v. FPC, 528 F. 2d 38, 45-46 (2nd Cir. 1975). In any event, FPA Section 15(a), 16 U.S.C. § 808(a), authorizes the Commission to issue new licenses "upon such terms and conditions as may be authorized or required under the then existing laws and regulations," and the reservation proviso to Section 4(e) is plainly an "existing law." *Lac Courte Oreilles Band v. FPC*, 510 F. 2d 198, 205 n. 22 (D. C. Cir. 1975).

accordance with plans and specifications approved by the Chief of Engineers and the Secretary of the Army." FPA Section 18, 16 U.S.C. § 811, provides that the licensee's operation of any navigable facilities "shall at all times be controlled by such reasonable rules and regulations in the interest of navigation . . . as may be made from time to time by the Secretary of the Army." Section 18 also directs the Commission to require:

the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of Commerce.

And FPA Section 26, 16 U.S.C. § 820, authorizes either the Commission or the Secretary of the Army to request the Attorney General to initiate litigation for the purpose of revoking a license for violation of its terms.

More recent laws reflect the same policy, A 1978 amendment to the Federal Power Act authorizes the Commission to exempt certain hydroelectric facilities from its licensing jurisdiction. But the Commission is required to:

include in any such exemption such terms and conditions as the Fish and Wildlife Service and the State [Fish and Game] agency each determine are appropriate to prevent loss of, or damage to, such [fish and wildlife] resources and to otherwise carry out the purposes of [the Fish and Wildlife Coordination] Act [16 U.S.C. §§ 661 *et seq.*]. . . .

FPA § 30(c), 16 U.S.C. 823a(c). Similarly, a 1980 statute expands the Commission's authority to grant exemptions subject to "the same limitations (to ensure protection for fish and wildlife as well as other environmental

concerns) as those which are set forth in Subsections (c) and (d) of Section 30 of the Federal Power Act [16 U. S. C. § 823a(c) and (d)]. . . .” 16 U. S. C. § 2705.

Thus, viewed in the context of the entire statute, the explicit delegation of authority over Indian, military and other reservations to the Secretaries of Interior, Agriculture, Army, Navy and Air Force contained in the reservation proviso to Section 4(e) is not an aberration. Rather, the Act as a whole plainly reveals Congress' intent to vest authority in the Commission to “coordinate” all aspects of hydroelectric licensing, *see* Pet. 15, while at the same time preserving the powers of other federal agencies over matters within their particular domain and expertise.⁶ This system apparently has worked well since the Federal Power

⁶The legislative history of Section 4(e) confirms its plain meaning. The reservation proviso was included in the original draft of the legislation that was sent to the Congress by the Secretaries of Agriculture, War and Interior. *See Chemehuevi Tribe of Indians v. FPC*, 489 F. 2d 1207, 1220 (D. C. Cir. 1973), *reversed on other grounds*, 420 U. S. 395 (1975). O. C. Merrill, the first Secretary of the Commission and one of the FPA's primary draftsmen, *see United States v. Public Utilities Commission*, 345 U. S. 295, 305 n. 10 (1953), wrote a memorandum explaining the provisions of the bill. With respect to what is now FPA Section 4(e), he wrote:

4. Licenses for power sites within the National Forests to be subject to such provisions for the protection of the Forests as the Secretary of Agriculture may deem necessary. Similarly for parks and other reservations under the control of the Departments of the Interior and of War. Plans of structures involving navigable streams to be subject to the approval of the Secretary of War.

This provision is for the purpose of preserving the administrative responsibility of each of the three Departments over lands and other matters within their exclusive jurisdiction.

JA 4020 (emphasis added).

Act was enacted in 1920. Prior to the 1979 decision in this case and the 1975 decision in *Pacific Gas & Electric Co.*, 53 FPC 523,⁷ any differences between the Commission and these agencies were reconciled through administrative processes, and the Commission had never refused to recognize the powers that are so clearly vested in others under the express terms of its governing statute. *See infra* at 17-21.

B. Alleged Conflicts.

Petitioners allege several conflicts with this Court's decisions. Pet. 11-13, 16-17. These conflicts are imaginary.

First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946), and *FPC v. Oregon*, 349 U.S. 435 (1955), involved the respective powers of the Commission and the states. But "[t]ribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to impart to one notions of preemption that are properly applied to the other." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

In addition, neither *First Iowa* nor *FPC v. Oregon* construed the reservation proviso to Section 4(e), the authority of the Secretaries of the Interior, Agriculture, Army, Navy and Air Force over affected reservations, or

⁷In *Pacific Gas & Electric*, unlike this case, the Secretary of Agriculture had not been a party to the Commission's proceedings and Agriculture's conditions were not supported by the evidence of record. *See infra* at 20 n. 13.

any laws applicable to Indians.⁸ It is particularly inappropriate to equate or analogize the powers and responsibilities of federal officials, tribes and states when their respective roles are governed by entirely dissimilar statutory provisions. Compare FPA Sections 4(e), 9(b), 10(e) and 27, 16 U.S.C. §§ 797(e), 802(b), 803(e), and 821. Indeed, *First Iowa* expressly contrasts the limited role of the States under the statute with "the 'comprehensive' planning which the Act provides shall depend upon the judgment of the . . . Commission or other representatives of the Federal Government" citing, *inter alia*, FPA § 4(e). 328 U.S. at 164 & n.9, emphasis added. See also, 328 U.S. at 167-68.

Further, there is a very significant practical difference between tribes and states. Every project licensed by the Commission involves a potential conflict with a state, while there are only a handful of licensed water power projects that utilize Indian lands. See *infra* at 21-23. While it is feasible for Congress to reserve to itself final authority over potential projects which provoke irreconcilable differences between the Commission, the Secretaries and affected tribes, it would defeat the very purpose of the Federal Power Act for Congress to be the final arbiter of all licensing disputes between the Commission and the States. See *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 167-68 (1953).⁹

⁸The project at issue in *FPC v. Oregon* was partially located on Indian lands, but no Indian issues were raised because "the Indians [gave] their consent" to the use of their lands. 349 U.S. at 444.

⁹*FPC v. Idaho Power Company*, 344 U.S. 17 (1952), also cited by the petitioners as conflicting with the decision be-

Petitioners' reliance on *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), is also misplaced. The holding of that case was that Tuscarora Indian fee lands were not subject to the protection of the Section 4(e) reservation proviso. They were not owned by the United States in trust for the Tribe and therefore were not encompassed within the FPA's definition of "reservations" in Section 3(2), 16 U.S.C. § 796(2). 362 U.S. at 115.¹⁰ Consequently, *Tuscarora* did not construe the scope of the reservation proviso. And the Court's opinion repeatedly emphasized that the taking of the Tuscarora's fee land for the Niagara Falls hydroelectric project did not violate any right granted to the Tribe by treaty or statute. 362 U.S. at 106 n.10, 121 n.18, 123, 124. Three circuit court decisions have held that the Federal Power Act, as construed in *Tuscarora*, does not sanction the taking of Indian lands that are protected by treaty or statute. *United States v. Truckee-*

(Continued from previous page)

low, Pet. 17, involved the validity of a condition imposed on a license by the Commission pursuant to FPA Section 10(g), 16 U.S.C. § 803(g). It had nothing to do with any Indian or other federal reservations or with the authority of any other federal officials. Nor did it construe or even mention the reservation proviso. Contrary to petitioners' unsupported charge, the Court of Appeals is no more of a factfinder when it reviews the reasonableness of the Secretary's Section 4(e) conditions than when it performs the same function in response to an attack on Commission's Section 10(g) conditions. See *infra* at 24-26.

¹⁰In this case, by contrast, both the reservation lands and water rights are "owned by the United States" within the meaning of Section 3(2). Pet. App. 4, 26. Contrary to the petitioners' confusing misstatements (Pet. 19-20), the holding of the Court of Appeals that Indian water rights constitute "reservations" as defined in that section is entirely consistent with the exclusion of the fee lands owned by the Tuscaroras.

Carson Irrigation District, 649 F. 2d 1286, 1298 n. 5 (9th Cir. 1981) reversed on other grounds, sub nom. *Nevada v. United States*, — U.S. — (No. 81-2245, June 24, 1983); *United States v. Winnebago Tribe of Indians*, 542 F. 2d 1002, 1005 (8th Cir. 1976); *Lac Courte Oreilles Band v. FPC*, 510 F. 2d 198, 210-12 (D. C. Cir. 1975).

While the decision below does not conflict with any decision of this Court, it is consistent with and supported by three other Court of Appeals' decisions, *Lac Courte Oreilles Band v. FPC*, supra; *Montana Power Company v. FPC*, 445 F. 2d 739, 756 (D. C. Cir. en banc 1970), cert. denied, 440 U.S. 1013 (*Montana II*); and *Montana Power Company v. FPC*, 298 F. 2d 335, 338 n. 2, 340 (D. C. Cir. 1962) (*Montana I*). *Lac Courte Oreilles* rejected the Commission's argument, which nevertheless was renewed in this case (Pet. App. 337-38), that the rights and powers of Indian tribes were abrogated by the Federal Power Act to whatever extent the Commission might find necessary in carrying out its licensing authority. *Montana I* and *Montana II* construe FPA Section 10(e), 16 U.S.C. § 803(e), as requiring the approval of the affected Indian tribe in order for a license application involving Indian lands to be approved by the Commission.¹¹

¹¹The Section 10(e) argument was raised by the Bands and Interior in this case and was rejected by the Commission. Pet. App. 161-68. It was one of several issues that the Court of Appeals found unnecessary to resolve in light of its FPA Section 4(e) and MIRA Section 8 rulings. See Pet. App. 28-29.

Petitioners (Pet. 16 n. 23) and the Amicus Curiae (Br. 14) seek to gain some comfort from *Montana Power Company v. FPC*, 459 F. 2d 863, 874 (D. C. Cir. 1972), cert. denied, 408 U.S. 930 (*Montana III*). But that decision simply held that

(Continued on next page)

The decision below does not break any new ground and does not conflict with any decisions of this or any other Court.

C. Administrative Construction.

There has not been a long-standing and consistent administrative construction that supports the petitioners' position. To the contrary, the Commission as well as the Secretaries of Interior and Agriculture have recognized the rights, powers, and responsibilities of the Secretaries and Indian tribes over hydroelectric projects involving federal and Indian reservations.

Petitioners principally rely on *Pigeon River Lumber Co.*, 1 FPC 206 (1935). Pet. 10, 11, 16. But that proceeding involved an application for a preliminary permit pursuant to FPA Sections 4(f) and 5, 16 U. S. C. §§ 797(1) and 798, not an application for a license. Hence, the reservation proviso was not yet applicable, and no secretarial conditions had been submitted or imposed. 1 FPC at 209.

The Office of Indian Affairs did contend in the *Pigeon River* proceeding that the preliminary permit "would be made untenable because of the conditions which the Secretary [of the Interior] would feel impelled to include in the license for the protection of the Indians." *Ibid.* The Com-

(Continued from previous page)

neither the Secretary nor the tribes had the power to approve readjustments of annual charges for the use of Indian lands during the term fixed by the license. Contrary to the Commission's view (Pet. App. 163 n. 166), the decision of the three judge panel in *Montana III* did not "supersede" the holding of the en banc Court in *Montana II* that Indian consent is a condition precedent to the issuance of licenses.

mission's opinion did not deal with this potential problem. It simply held that under the first clause of the reservation proviso it is the obligation of the Commission, not the Secretary, to make the finding that the license will not interfere or be inconsistent with the purpose of the reservation. The Commission added that it would give great weight to the judgment and recommendation of the Secretary in making that determination.¹² Since the application for the preliminary permit was denied on other grounds, the Commission never confronted the issue raised in this case. While *Pigeon River* is therefore of no aid to the petitioners, it does evidence the Interior Department's consistent and longstanding position from 1935 to the present that any license issued by the Commission must include the Secretary's conditions.

Arizona Power Authority, 39 FPC 955 (1968), is inconsistent with the petitioners' position. In that proceeding, which involved a proposed project that would utilize Indian lands and waters, the Secretary expressed concern about whether the Tribe's water resources would be adequate to supply the project's requirements without unreasonable detriment. The Commission responded by imposing a condition on the license requiring the licensee to demonstrate that the Tribe was satisfied that the concerns raised by the Secretary had been resolved, 39 FPC at 958,

¹²The Indian Office also objected to the permit on the grounds that the Indian Tribe could prevent the use of its lands without its consent by virtue of Section 16 of the Indian Reorganization Act, 25 U. S. C. § 476. But the Commission found it unnecessary to resolve that question because the Tribe had not brought itself under the provisions of that Act. 1 FPC at 208-09.

thereby recognizing that the use of tribal waters should not be allowed in the absence of tribal consent.

The legislative history of the 1968 Amendment to the FPA is also instructive. Congress amended FPA Section 15, U. S. C. § 808, by authorizing the Commission to license projects for nonpower use whenever it found that a project should no longer be used for power purposes. During Committee hearings on the bill, the Secretary of Agriculture commented on the effect of the bill on national forests. The Secretary stated his understanding, which was based on discussions between his Department and the Commission Staff, that licenses within national forests would be issued "only with the consent of [the Agriculture] Department and [would be] subject to such conditions" as the Secretary of Agriculture deemed "necessary for the adequate protection and utilization of the [such] lands." H. R. Rep. No. 90-1643, 90th Cong., 2d Sess. 14-15 (1968). Thus, the Department of Agriculture as well as the Commission Staff acknowledged the supremacy of the powers vested in the Secretaries under the reservation proviso as recently as 1968.

This division of responsibility between the Commission and the Secretaries was described by the Report of the expert body established by Congress pursuant to 78 Stat. 982 (1964) to review the administration of federal lands. After quoting the reservation proviso, the Report states:

[T]he Federal Power Commission is given the ultimate authority to decide whether a project having an impact on a Federal reservation shall be licensed, presumably even over the holding agency's objection . . . , although the Commission must include such conditions

in the license as the holding agency considers necessary.

Public Land Law Review Commission, *One Third of the Nation's Land* 154 (GPO 1970). This statement is especially noteworthy because representatives of the Commission served as federal members of the Advisory Council established pursuant to the statute. See 78 Stat. 982, 983; *One Third of the Nation's Land*, *supra*, vi, vii.

Thus, at no time prior to its 1975 decision in *Pacific Gas & Electric Co.*, 53 FPC 523, 526, did the Commission ever reject a Secretarial condition imposed pursuant to the reservation proviso.¹³ By contrast, the Secretaries of Interior and Agriculture, joined by the Public Land Law Review Commission and even once by the Commission Staff, have long and consistently maintained that the Secretaries' Section 4(e) conditions must be included in Commission licenses. See 1 FPC at 209; H.R. Rep. No. 90-1643, *supra*, 14-15; 53 FPC at 524, 526; JA 2652, 2664, 2667-68. And the Commission's 1973 decision in *Northern States Power Company*, 50 FPC 753, was the first and only occasion before this case in which the Commission claimed that the Federal Power Act extinguished preexisting rights of Indian Tribes under applicable treaties and statutes.

¹³The Secretary of Agriculture and the Justice Department did not appeal the Commission's decision in *Pacific Gas & Electric*, perhaps because Agriculture was not a party to the proceeding, 53 FPC at 524, and, unlike this case, see *supra* at 2-3, Agriculture's conditions were not supported by the record, 53 FPC at 526. It is also worth noting that the Commission's decision in *Pacific Gas & Electric* was issued in February 1975, approximately a month before the Commission's exaggerated view of its own powers was reversed as "plain error" in *Lac Courte Oreilles Band*, *supra*.

The *Northern States* holding was subsequently reversed as "plain error" in *Lac Courte Oreilles Band v. FPC*, *supra*, 510 F. 2d at 210-12. Prior administrative practice therefore does not detract from, but rather supports and reinforces, the plain meaning of the reservation proviso.

The decision below is predicated on the plain meaning of the Federal Power Act, is consistent with prior administrative practice and construction and with other lower court decisions, and does not conflict with any decisions of this or any other Court. It does not warrant review, particularly in its current interlocutory posture.

III. The Decision Below Affects Few, If Any, Hydroelectric Projects.

Of the more than 800 hydroelectric projects licensed by the Commission, only a handful are located on Indian lands or adversely affect Indian water rights. In response to a request for a "complete list" of licensed facilities that utilize Indian lands or waters from the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, the Commission identified only eight such projects including Project No. 176. *Hearings on Federal Protection of Indian Resources Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 7, at 1677-85 (1972) (hereafter cited as *Hearings*).¹⁴ Of these, two

¹⁴Petitioners refer to a statement by the Commission's attorney at the oral argument before the Ninth Circuit that there are 35 licensed projects that utilize Indian lands. Pet. 7 n. 12. The oral statement appears to be at odds with the thoroughly

use Indian lands only for relatively short transmission lines that are directly connected to hydroelectric facilities. *Ibid.* at 1684-85.¹⁵ One of the listed projects, the Montezuma Pumped-Storage Project in Arizona, is the only one other than Project No. 176 which was said to affect Indian water rights. *Ibid.* at 1683. That project has never been built.¹⁶ Thus, at most, the decision below might affect four Indian projects in addition to the one involved in the instant case. As noted *supra* at 14 n.8, the Tribes of the Warm Springs Reservation expressly consented to the use of their land for one of those projects. The license for that project does not expire until 2001. *Hearings, supra*,

(Continued from previous page)

documented, written analysis signed by the Chairman of the Commission cited in the text.

Part of the discrepancy may be attributable to transmission line licenses issued by the Commission prior to the holding in *Pacific Power and Light Co. v. FPC*, 184 F. 2d 272 (D. C. Cir. 1950), that the Commission lacks jurisdiction over transmission lines that are not directly connected to hydroelectric facilities. The Commission identified 20 such lines that traverse Indian lands in its response to the Subcommittee on Administrative Practice and Procedure. The licenses for 14 of those projects had expired prior to the July 1982 argument before the Ninth Circuit and 4 more will expire in the next 4 years. *Hearings, supra*, at 1686-89. Since the Commission lacked jurisdiction to issue transmission line licenses, they are not included in our analysis. See also, note 15 *infra*.

¹⁵The use of Indian lands for transmission lines is unlikely to raise the kinds of conflicts between the Commission, tribes and the Secretary that arose in this case. In many, perhaps most, instances, reservations benefit from the transmission lines which provide electricity to their residents.

¹⁶August 8, 1983 personal communication between the Bands' Counsel of Record and the attorney for the Gila River Pima Maricopa Indian Community.

at 1682. In the case of the Kerr Project on the Flathead Indian Reservation, the Confederated Salish and Kootenai Tribes receive \$2,600,000 per year in annual charges for the use of their lands, so it is extremely unlikely that the Tribes would withhold their consent even if they had the power to do so. *Montana Power Company*, 5 FERC ¶61,126 (1978).¹⁷ The Kerr Project is also governed by its own special specific statutes that may qualify or supersede the FPA or otherwise applicable Indian laws. See Acts of May 10, 1926 and March 7, 1928, 44 Stat. 453, 465, 45 Stat. 200-212-13, discussed in the Amicus Curiae Brief of Joint Board of Control at 2. And the controversy between the Northern States Power Company and the Tribe concerning Project No. 108 that gave rise to *Lac Courte Oreilles Band v. FPC*, *supra*, 510 F.2d 198, appears to be nearing a negotiated settlement. See *Northern States Power Co.*, Commission Order Denying Late-Filed Petitions to Intervene dated May 17, 1983. It is therefore apparent that the Ninth Circuit's decision will have little, if any, impact on other licensed projects that utilize Indian lands or waters.

Even if there were many more licensed projects that utilize Indian lands and waters, the precedential impact of the Ninth Circuit's ruling regarding the relationship between the Federal Power Act and the Mission Indian Relief Act would be limited to the unusual circumstances

¹⁷In the typical case involving hydroelectric projects utilizing Indian lands or waters, illustrated by the *Montana Power Company* cases discussed *supra* at 16, the principal issue that arises is the determination of appropriate compensation pursuant to FPA Section 10 (e), 16 U. S. C. § 803 (e). The decision below does not construe Section 10 (e) or affect the manner in which annual charges are calculated.

of this case.¹⁸ As explained *supra* at 8-9, Section 8 of MIRA would apply to the use of the Bands' reservations for the water conveyance facilities included in Project No. 176 even if FPA Section 29 repeals other, pre-1920 Indian statutes as applied to projects whose primary and essential purpose is the development of hydroelectric power. And there are no other hydroelectric projects that utilize lands and waters of Mission Indian Reservations.

The one aspect of the decision below that might possibly have a broader impact is the holding that Commission licenses must include the Secretarial conditions authorized by the reservation proviso.¹⁹ But this provision was enacted as part of the Federal Power Act in 1920 and it has given rise to only two conflicts between the Commission and the respective Secretaries despite the Secretaries' long and consistently maintained position that Com-

¹⁸Since the Montezuma Pumped Storage Project was the only other license identified by the Commission that affects Indian water rights and that project was never constructed, see *supra* at 22, the Ninth Circuit's holdings that Indian water rights are encompassed in the FPA's definition of "reservations" and are protected by the reservation proviso will not affect any other existing Indian projects. The reserved water rights of National Forests and other federal reservations are quite limited, see *United States v. New Mexico*, 438 U. S. 696 (1978), and there is no evidence that the operation of any licensed project conflicts with the water rights that are deemed necessary to fulfill the purposes of any such reservation. Since the Commission is required by the first clause of the reservation proviso to find that the license will not interfere or be inconsistent with the purposes of such reservations, it is unlikely that any such conflicts would have escaped notice.

¹⁹Assuming its accuracy (which we doubt), the figure of 606 licensed projects that utilize federal lands and reservations, Pet. 7 n. 12, is irrelevant. The power of the Secretaries to impose conditions under Section 4 (e) is limited to reservations. See FPA § 3 (1), 16 U. S. C. § 796 (1).

mission licenses "shall be subject to and contain" their conditions. *Supra* at 17-20. There is no reason to expect the frequency of such conflicts to increase in the future. The Commission and the Secretaries should seek mutually satisfactory solutions no matter who has the final say. See *FPC v. Oregon*, 349 U.S. 435, 449 n. 20 (1955).

The decision below does not prevent the Commission from hearing, considering and evaluating evidence and arguments concerning Secretarial Section 4(e) conditions. It does not preclude consultation between the Commission and the Secretaries, nor does it bar the Commission from pointing out defects in the Secretaries' conditions or from recommending changes in them. And it does not establish or create any unconditional veto powers. It simply holds that when all is said and done, the Commission's licenses shall, in conformity with the directive of the reservation proviso, "be subject to and contain" the Secretaries' conditions.

That holding has two ramifications. It means, first, that the Secretaries' conditions, not the Commission's, are entitled to the presumption of validity for the purpose of appellate court review. Put another way, the role of the appellate court will be to determine whether the Secretaries' conditions, not the Commission's substitutes, are reasonable and are supported by substantial evidence. See *FPA* §§ 4(e), 313(b), 16 U.S.C. §§ 797(e), 825l(b) (Court of appeals has jurisdiction to review the Commission's Orders which "shall be subject to and contain" the Secretaries' conditions); *Pet. App. 24-25, modified*, 32-33. See also, *Pet. App. 40-41* (dissenting opinion). Second, it means that the substantive content of the conditions will

be governed by what is deemed necessary for the adequate protection and utilization of the reservations, not by broad and amorphous concepts of the public interest. *Compare* Pet. App. 143.²⁰ Both of these consequences of the Court of Appeals' decision are mandated by the express terms of the reservation proviso and are supported by its legislative history, and neither one will frustrate the objectives of the Federal Power Act. *See supra* at 5-6, 10-13.

In the final analysis, the contrary position of the petitioners rests on the entirely unsupported assumption that, notwithstanding the reservation proviso, Congress intended to make the protection and utilization of federal and Indian reservations subservient to the Commission and to the development of water power projects. Congress not only rejected that course when the FPA was enacted in 1920, but has continued to qualify the powers granted to the Commission in order to insure the fulfillment of other important national policies, even during the recent energy crisis. *See* 16 U.S.C. §§ 823a(c), 2705, discussed *supra* at 11-12. Petitioners' argument for a change in that long-standing and consistent policy should be addressed to the Congress. It is particularly out of place in this case in which the production of power is secondary and incidental to the primary purpose of Project No. 176.

²⁰Of course, the Secretaries' powers under Section 4 (e) are limited to insuring the adequate protection and utilization of affected reservations. Subject to the exceptions noted in Part II A *supra*, all other aspects of a hydroelectric project are subject to the broad powers granted to the Commission under FPA Sections 10 (a) and 10 (g), 16 U.S.C. §§ 803 (a), 803 (g).

CONCLUSION

The petition for a writ of certiorari should be denied.

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August, 1983.

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No. 82-2056

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ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States

October Term, 1983

ESCONDIDO MUTUAL WATER CO., et al.,
Petitioners,
vs.

LA JOLLA BAND OF MISSION INDIANS,
FEDERAL ENERGY REGULATORY COMMISSION,
SECRETARY OF THE INTERIOR, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit

**SUPPLEMENTAL BRIEF IN
OPPOSITION OF RESPONDENTS LA JOLLA, RINCON,
SAN PASQUAL, PAUMA AND PALA BANDS
OF MISSION INDIANS**

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TABLE OF CONTENTS

	Pages
Motion for Leave to File Supplemental Brief _____	1
Supplemental Brief _____	2

TABLE OF AUTHORITIES

CASES

<i>Albrecht v. United States</i> , 329 U. S. 599 (1947) _____	5
<i>California v. FPC</i> , 345 F. 2d 917 (9th Cir. 1965), cert. denied, 382 U. S. 941 _____	5
<i>United States v. Appalachian Electric Power Co.</i> , 311 U. S. 377 (1940) _____	5
<i>Winters v. United States</i> , 207 U. S. 564 (1908) _____	5

STATUTES

Section 1, 16 U. S. C. § 792 _____	2
Section 2, 16 U. S. C. § 793 _____	2
Section 3(2), 16 U. S. C. § 796(2) _____	5
Section 4(e), 16 U. S. C. § 797(e) _____	2, 3, 4
Section 6, 16 U. S. C. § 799 _____	4
Section 10(g), 16 U. S. C. § 803(g) _____	3, 4
Section 313(b), 16 U. S. C. § 825!(b) _____	3
41 Stat. 1063, 1065-66 (1920) _____	2
41 Stat. 1063 (1920) _____	2
46 Stat. 797 (1930) _____	2

TABLE OF AUTHORITIES—Continued

	Pages
OTHER AUTHORITIES	
Hearing Before the Committee on Interstate and Foreign Commerce on H. R. 11408, 71st Cong., 2d Sess. 28	3

No. 82-2056

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**MOTION FOR LEAVE TO FILE SUPPLEMENTAL
BRIEF and SUPPLEMENTAL BRIEF IN
OPPOSITION OF RESPONDENTS LA JOLLA, RINCON,
SAN PASQUAL, PAUMA AND PALA BANDS
OF MISSION INDIANS**

**MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF**

The Brief in Opposition of the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians (Bands) was served on August 22, 1983. Approximately one month later, two Briefs were filed by *Amici Curiae*¹ in

¹One Brief was filed on behalf of the American Public Power Association, hereafter cited as APPA Brief. The other Brief was filed on behalf of the Colorado River Water Conservation District and the Kings River Conservation District, hereafter cited as CRWCD Brief.

support of the Petition. The Bands seek leave to file a Supplemental Brief to respond to several arguments urged for the first time in these Amici Briefs.

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SUPPLEMENTAL BRIEF

1. Both the Amici claim that the plain meaning of the reservation proviso to FPA Section 4(e), 16 U. S. C. § 797 (e), is at odds with the Act's legislative history. APPA Br. at 16-22; CRWCD Br. at 5-6. They rely on statements made during the course of hearings to a 1930 Amendment to the Federal Power Act.

The reservation proviso was included in its present form in Section 4(d) of the Federal Power Act as it was originally enacted in 1920. 41 Stat. 1063, 1065-66. The 1930 Amendment had nothing whatsoever to do with Section 4. It changed only FPA Sections 1 and 2. 46 Stat. 797. Section 1, 16 U. S. C. § 792, removed the Secretaries of War, Interior and Agriculture as members of the Commission and replaced them with five independent commissioners appointed by the President. Section 2, 16 U. S. C. § 793, authorized the Commission to appoint its own staff so that it would no longer have to be dependent on staff work performed by personnel from the Departments of War, Agriculture and Interior. Compare Section 2 of the 1920 FPA, 41 Stat. 1063. No one testified or even suggested that the Commission could or should override, modify or reject conditions that the relevant Secretary deemed necessary for the adequate protection and utilization of

reservations.² One committee member summarized the bill by stating that it would "not affect in any way the present law with reference to . . . the conditions under which [licenses] are granted." Hearing Before the Committee on Interstate and Foreign Commerce on H. R. 11408, 71st Cong., 2d Sess. 28.

2. Both Amici also perceive problems with obtaining meaningful judicial review of the Secretaries' Section 4(e) conditions, APPA Br. at 12, 26 n. 22; CRWCD Br. at 8, but their concerns are imaginary. A Commission Order denying a license because of the Section 4(e) conditions imposed by the Secretaries plainly would be reviewable under FPA § 313(b), 16 U. S. C. § 8257(b). Applicants for licenses surely would be "aggrieved" by Commission Orders dismissing their applications or issuing licenses with unwanted and undesirable conditions and they certainly would have ample incentive to seek judicial review of such orders. The validity of the Secretaries' Section 4(e) conditions, no less than the conditions imposed by the Commission pursuant to FPA § 10(g), 16 U. S. C. § 803(g), will be judged on the basis of the Commission's administrative

²The Counsel for the Commission testified that the Commission could "override the head of a department as to the consistency of a license with the purpose of any reservation." See APPA Br. at 9; CRWCD Br. at 6. No one contests the Commission's ultimate authority to make this determination under the explicit language of the first clause of the reservation proviso. It is equally clear under the second clause of the proviso, however, that licenses "shall be subject to and contain" conditions which the relevant Secretary deems necessary for the adequate protection and utilization of reservations. This same division of authority, so clear on the face of the reservation proviso, was also described thirty-four years later in the Report of the Public Land Law Review Commission. See Bands' Br. in Opposition at 19-20.

record, not a *de novo* hearing in the court of appeals. *See Bands' Br.* at 2-4, 25-26. If the conditions are not supported by that record, they will be set aside. *See Bands' Br.* at 20 n.13.

3. In an effort to manufacture an ambiguity in the Federal Power Act and to avoid the plain meaning of the reservation proviso, Amici point to FPA § 6, 16 U. S. C. § 799. APPA *Br.* at 13-14; CRWCD *Br.* at 4 n.3. Section 6 provides that licenses "shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe *in conformity with this Act.* . . ." Emphasis added. The Section goes on to state that "[l]icenses . . . may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice."

Nothing in this general provision either overrides or is the slightest bit inconsistent with the reservation proviso. It certainly cannot be deemed under any reasonable construction to vest authority in the Commission and the licensee to amend or eliminate the Secretaries' Section 4(e) conditions. Any such "reconditioning" by the Commission plainly would not be "in conformity with this Act." *See also*, FPA § 10(g), 16 U. S. C. § 803(g). FPA Section 6 is so far removed from the issues concerning the Secretaries' Section 4(e) powers that it was not mentioned by the Commission in the extensive discussion of that issue in its opinion, *Pet. App.* 143-47, nor was it cited in the Petition as a major statutory provision involved in this case, *Pet.* 2; *Pet. App.* 381-82.

4. Contrary to APPA's contention (*Br.* at 27-30), the Secretary's Section 4(e) conditions do not constitute an

adjudication of anyone's water rights. The petitioners voluntarily applied for a license to utilize "tribal lands embraced within Indian reservations" and "interests in [Indian] lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." FPA § 3(2), 16 U.S.C. § 796(2). Their application therefore triggered the statutory obligation of the Secretary of the Interior to formulate and impose conditions deemed "necessary for the adequate protection and utilization" of the reservations. The Secretary's conditions do not adjudicate anyone's rights; they describe what is needed for the adequate protection and utilization of the reservations regardless of the parties' respective water rights or legal entitlements.³ They are part of "the price which must be paid to secure the right[s]" granted by the license. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 427-28 (1940). They are contractual in nature, the very opposite of adjudicatory, in the sense that the license can be accepted or rejected as the petitioners' see fit. See *Albrecht v. United States*, 329 U.S. 599, 603 (1947); *California v. FPC*, 345 F. 2d 917, 921-24 (9th Cir. 1965), cert. denied, 382 U.S. 941.

³Water would be necessary for the protection and utilization of the reservations even if there were no Winters doctrine (*Winters v. United States*, 207 U.S. 564 (1908)) and the reservations had no existing legal entitlements to water.

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ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

OCTOBER TERM, 1983

ESCONDIDO MUTAL WATER COMPANY, ET AL.,
PETITIONERS

v.

LAJOLLA, RINCON, SAN PASQUAL, PAUMA AND
PALA BANDS OF MISSION INDIANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 8 of the Mission Indians Relief Act, ch. 65, 26 Stat. 714, requires a Federal Power Act licensee whose hydroelectric project traverses Mission Indian reservation lands to obtain the consent of the affected Indian Bands for the use of such lands.
2. Whether Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), requires the Federal Energy Regulatory Commission to accept without modification conditions developed by the Secretary of the Interior for inclusion in a license for a hydroelectric project that utilizes Indian reservation lands.
3. Whether the Secretary of the Interior's authority under Section 4(e) of the Federal Power Act, to develop conditions for the protection and utilization of reservations, extends to three Mission Indian reservations whose lands are not to be utilized for a hydroelectric project, but whose reserved water rights may be affected by the project.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Statement	2
Argument	14
Conclusion	21

TABLE OF AUTHORITIES

Cases:

<i>FPC v. Idaho Power Co.</i> , 344 U.S. 17	16
<i>FPC v. Oregon</i> , 349 U.S. 435	15-16
<i>FPC v. Tuscarora Indian Nation</i> , 362 U.S. 99	16, 17
<i>First Iowa Hydro-Electric Cooperative v. FPC</i> , 328 U.S. 152	15
<i>Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. FPC</i> , 510 F.2d 198	10-11
<i>Pacific Gas & Electric Co.</i> , 53 F.P.C. 523	19

Statutes:

Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063, recodified as Federal Power Act, 16 U.S.C. 791a <i>et seq.</i>	2, 5
Section 3(2), 16 U.S.C. 796(2)	12
Section 3(11), 16 U.S.C. 796(11)	10
Section 4(e), 16 U.S.C. 797(e)	8, 9-10, 11, 12, 13, 15, 16, 17, 18, 19
Section 4(g), 16 U.S.C. 797(g)	6
Section 6, 16 U.S.C. 799	17
Section 9(b), 16 U.S.C. 802(b)	9, 15
Section 10(a), 16 U.S.C. 803(a)	8, 11, 12
Section 10(e), 16 U.S.C. 803(e)	5
Section 10(i), 16 U.S.C. 803(i)	6
Section 14, 16 U.S.C. 807	6
Section 14(b), 16 U.S.C. 807(b)	6

IV

Statutes—Continued

	Page
Section 15, 16 U.S.C. 808	8
Section 15(a), 16 U.S.C. 808(a)	5, 18
Section 15(b), 16 U.S.C. 808(b)	6
Section 29, 16 U.S.C. 823	10
Section 313(b), 16 U.S.C. 825l(b)	12, 18
Mission Indians Relief Act of 1891, ch. 65, 26 Stat.	
712 <i>et seq.</i>	2, 3
Section 8, 26 Stat. 714	10, 11, 15, 18, 19
42 U.S.C. (Supp. V) 7172(a)	2
42 U.S.C. (Supp. V) 7195(b)	2

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2056

ESCONDIDO MUTAL WATER COMPANY, ET AL.,
PETITIONERS

v.

LAJOLLA, RINCON, SAN PASQUAL, PAUMA AND
PALA BANDS OF MISSION INDIANS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 692 F.2d 1223. The court of appeals' order on petitions for rehearing (Pet. App. 31-41) is reported at 701 F.2d 826. The opinions and orders of the Federal Energy Regulatory Commission (Pet. App. 42-309, 310-378) are reported at 6 F.E.R.C. ¶ 61,189 and 9 F.E.R.C. ¶ 61,241. The initial decision of the Administrative Law Judge (not included in the appendix to the petition) is reported at 6 F.E.R.C. ¶ 63,008.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1982. Petitions for rehearing were denied on March 17, 1983. The petition for a writ of certiorari was filed on June 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 8 of the Mission Indians Relief Act ("MIRA"), ch. 65, 26 Stat. 714, is set forth at Pet. App. 379-380. The pertinent provisions of the Federal Power Act ("FPA"), 16 U.S.C. 791a *et seq.*, are set forth at Pet. App. 380-388.

STATEMENT

The legal issues presented arise in the context of the decision of the Federal Energy Regulatory Commission¹ to issue a license permitting the Escondido Mutual Water Company, the City of Escondido and the Vista Irrigation District to operate a small hydroelectric project (Project No. 176) near Escondido, California. As the Commission recognized (Pet. App. 132, 338), however, the principal function of Project No. 176 is not to generate power, but to serve as a water conveyance facility for diverting water from the San Luis Rey River watershed to the Escondido and Vista service areas for municipal and agricultural uses. The instant controversy is only part of a much larger underlying dispute between the petitioners, on the one hand, and the the Secretary of the Interior and the LaJolla, Rincon, San Pasqual, Pauma,

¹ The term "Commission" refers to the Federal Power Commission prior to October 1, 1977, and to the Federal Energy Regulatory Commission thereafter. See 42 U.S.C. (Supp. V) 7172(a) and 7295(b).

and Pala Bands of Mission Indians, on the other, over rights to water in the San Luis Rey River watershed, a dispute over which the Commission acknowledges it has no jurisdiction (*id.* at 99).

1. The San Luis Rey River originates near Palomar Mountain in northern San Diego County, California. In its natural condition, it flows through the LaJolla, Rincon and Pala Indian Reservations and then through the City of Oceanside on its way to the Pacific Ocean. Three other Indian reservations—the Pauma, Yuima² and approximately three quarters of the San Pasqual—also are within the watershed. (A general map of the area is reproduced at Pet. App. 30 and 308.) These six Indian reservations were established pursuant to the Mission Indians Relief Act of 1891 (“MIRA”), ch. 65, 26 Stat. 712 *et seq.*

Since 1895, the Escondido Mutual Water Company (“Mutual”) and its predecessor in interest have diverted the waters of the San Luis Rey River out of the watershed to the community in and around the City of Escondido. The point of diversion is located within the LaJolla Indian Reservation at a point upstream from the other reservations. The conveyance facility, known as the Escondido Canal, traverses parts of the LaJolla, Rincon and San Pasqual Indian Reservations, as well as some private lands and federal lands administered by the Bureau of Land Management. The canal terminates at Lake Wohlford, an artificial storage facility. Various agreements, dating back to 1894, among the Secretary of the Interior, one of the Mission Indian Bands, and Mutual’s predeces-

² The two Yuima tracts are under the jurisdiction of the Pauma Band of Mission Indians. Consequently, while six reservations are affected by the project, only five governing Indian Bands are involved in the instant case.

sor purportedly grant rights-of-way for the Escondido Canal across the reservation lands in return for supplying certain amounts of water to the Bands (Pet. App. 49-58). The validity of those agreements is the subject of separate proceedings instituted by the Bands (and subsequently joined by the United States) in the United States District Court for the Southern District of California. *Rincon Band of Mission Indians, et al. v. Escondido Mutual Water Co., et al.*, Nos. 69-217-S, 72-276-S & 72-271-S.³

In 1915, Mutual constructed the Bear Valley powerhouse, which is located downstream from Lake Wohlford, and which draws water from that lake; the Bear Valley powerhouse has a capacity of 520 kilowatts ("kw") (Pet. App. 53 & n.24). In 1916, Mutual completed construction of the Rincon powerhouse, which is located on the Rincon Reservation and which draws water from the Escondido Canal; the Rincon powerhouse has a capacity of 240 kw (*id.* at 53). In 1922, the predecessor of Vista Irrigation District ("Vista") constructed Henshaw Dam on the San Luis Rey River, approximately nine miles upstream from Mutual's diversion dam. Pursuant to a complex contractual relationship, Vista and Mutual have shared the output of Lake Henshaw and the use of the Escondido Canal (*id.* at 56-58).

³ In their complaint, the Bands sought (1) a declaratory judgment that the rights-of-way agreements are void; (2) an injunction prohibiting diversion of the waters of the San Luis Rey River into the Escondido Canal; and (3) substantial damages. On January 10, 1980, the district court entered an order granting partial summary judgment in favor of the Bands and voiding portions of the disputed contracts. The court of appeals refused to permit an interlocutory appeal of that order, and the case remains pending before the district court (Pet. App. 7).

In 1921, following enactment of the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 (now codified as Part I of the Federal Power Act ("FPA"), 16 U.S.C. 791a *et seq.*), Mutual applied to the Commission for a license covering its project. In 1924, the Commission issued a 50-year license to Mutual covering the Escondido diversion dam and canal, Lake Wohlford, and the Rincon and Bear Valley powerhouses (but not Vista's Henshaw facilities).⁴

Since 1925, Mutual and Vista have captured approximately 90% of the flow of the San Luis Rey River at the diversion dam on the LaJolla Reservation and have diverted those waters to Lake Wohlford. Approximately 10% of the diverted flow has been delivered to the Rincon Reservation pursuant to a contract entered into by the Secretary of the Interior in 1914. No project water has been delivered to any of the other reservations (Pet. App. 6). As already noted, litigation over the water rights to the San Luis Rey River has been pending in the district court since 1969.

2. a. In 1969 and 1970, the Secretary of the Interior and the LaJolla, Rincon and San Pasqual Bands filed complaints with the Commission, alleging that Mutual and Vista had violated the terms of Mutual's 1924 license. They sought, *inter alia*, increased annual charges⁵ to the Bands through the term of the 1924 license. In response, the Commission initiated

⁴ Mutual's license expired in 1974. Since then, it has operated Project No. 176 under annual licenses issued pursuant to Section 15(a) of the FPA, 16 U.S.C. 808(a).

⁵ Annual charges are the sums paid by a licensee for use of reservation lands pursuant to the provisions of Section 10(e) of the FPA, 16 U.S.C. 803(e).

an investigation pursuant to Section 4(g) of the FPA, 16 U.S.C. 797(g).

In April 1971, Mutual (subsequently joined by the City of Escondido) filed an application with the Commission for a new minor hydroelectric license⁶ for Project No. 176. In its application, Mutual proposed to continue operating the project as it had during the original license period.

In 1972, the Secretary requested the Commission to recommend federal takeover of Project No. 176, pursuant to Section 14 of the FPA, 16 U.S.C. 807, after expiration of the original license.⁷ Additionally, the LaJolla, Rincon, and San Pasqual Bands, acting pursuant to Section 15(b) of the FPA, 16 U.S.C. 808(b), applied for a nonpower license, under the supervision of Interior, to take effect when the original license expired.⁸ The Pauma and Pala Bands subsequently joined in this application. Under both Interior's federal takeover proposal and the Bands' application for a nonpower license, the licensed project facilities would be used for the economic development, primarily agricultural and recreational, of the reservations.

⁶ Section 10(i) of the FPA, 16 U.S.C. 803(i), authorizes the Commission to waive certain conditions and requirements in issuing a minor license for a complete project with a capacity not exceeding 2,000 horsepower (which is the equivalent of 1,500 kw).

⁷ Section 14(b) of the FPA, 16 U.S.C. 807(b), authorizes the Commission to recommend to Congress that the federal government take over a project following expiration of the project's license. If Congress enacts legislation to that effect, the project is operated by the government.

⁸ Section 15(b) of the FPA authorizes the Commission to grant a license to use a project as a "nonpower" facility if it finds the project no longer is adapted to power production.

b. After extensive hearings, an administrative law judge ("ALJ") concluded that Project No. 176 is not subject to the Commission's licensing jurisdiction because the power aspects of the project are insignificant in comparison to the project's primary purpose of conveying water for domestic and irrigation consumption (see Pet. App. 74-75). The ALJ emphasized that the horsepower generated by the entire project was "not even the equivalent to that produced by a half dozen modern automobiles" (Pet. App. 13). The ALJ accordingly recommended dismissal of all Commission proceedings relating to Project No. 176.

c. The Commission reversed the ALJ, holding that it had jurisdiction over the project. In so holding, the Commission concluded (Pet. App. 77-78; footnotes omitted):

So long as any part of a project is situated on navigable waters, or on public lands or reservations, and so long as that project generates any electric power, however minor in amount and however insignificant to the project as a whole, and so long as interstate or foreign commerce is affected, the works of that project are subject to be licensed and required to be licensed under the Federal Power Act.

With regard to the past operation of Project No. 176, the Commission found that Mutual had violated its license by permitting Vista's joint use of project facilities and by diverting water stored in the Lake Henshaw reservoir and pumped from that reservoir through the Escondido Canal (Pet. App. 226-232). It awarded readjusted annual charges to the LaJolla and Rincon Bands as of September 1969, and to the San Pasqual Band as of May 1970, in amounts based on the operations authorized by the 1924 license (*id.* at 232-234). The Commission held, however, that any

retroactive compensation for use of reservation lands (other than as authorized by Mutual's 1924 license) must be sought in federal district court (*id.* at 230).

The Commission denied Interior's recommendation for federal takeover of Project No. 176 and the Bands' application for a nonpower license. Instead, it granted a new 30-year license to petitioners Mutual, the City, and Vista.⁹ The Commission included certain conditions in the new license designed to satisfy the requirements of Sections 4(e) and 10(a) of the FPA, 16 U.S.C. 797(e) and 803(a), that the license "not interfere or be inconsistent" with the purposes for which the Indian reservations were created and that the project be the one "best adapted to a comprehensive plan" for the development of the San Luis Rey River (Pet. App. 147, 185). Specifically, the Commission required development of a permanent water operating plan (*id.* at 171) and delivery of certain quantities of water to the LaJolla, Rincon, and San Pasqual Reservations for domestic, agricultural, and commercial uses (*id.* at 187). The Commission did not impose similar conditions with respect to the Pala, Pauma and Yuima Reservations, which are located downstream from the project, because it concluded that Section 4(e) applies only to reservations that are physically occupied by the project facilities (Pet. App. 138).

⁹ Although Vista had not applied for a license with Mutual, the Commission determined that it should be made a joint licensee because its Henshaw facilities are an integral part of the project (Pet. App. 80-86). Once the Commission decided to include the Henshaw facilities in the project license, it treated the proceedings as an application for an initial license rather than as a relicensing pursuant to Section 15 of the FPA, 16 U.S.C. 808 (Pet. App. 133-137 & n.136).

Pursuant to Section 4(e) of the Act, the Secretary of the Interior developed conditions for inclusion in the license which he deemed "necessary for the adequate protection and utilization" of the affected reservations. The Commission accepted some of the Secretary's Section 4(e) conditions, but rejected or modified others on the ground that they would prevent the Commission from carrying out its licensing obligations (Pet. App. 143-155).¹⁰

Finally, the Commission noted that the outcome of the water rights litigation pending in district court may have a significant impact on the continued validity of the license (Pet. App. 187 n.192).¹¹ It therefore specified that the license may be modified "in any manner considered appropriate" after disposition of the water rights litigation (*id.* at 259).

3. a. The court of appeals reversed the Commission's order issuing a license to petitioners and remanded the case to the Commission for further proceedings (Pet. App. 1-29). The court first upheld the Commission's assertion of jurisdiction over the project. Although it recognized that the principal function of the project was to convey water (*id.* at 13-14), the court held that the Commission had reasonably construed the Federal Power Act as granting it jurisdiction over all projects "for the development, transmission, and utilization of power" (16 U.S.C.

¹⁰ The Commission rejected the Secretary's Section 4(e) conditions with respect to the Pala, Pauma and Yuima Reservations because the project is not located within those reservations (Pet. App. 146-147).

¹¹ Section 9(b) of the FPA, 16 U.S.C. 802(b), requires applicants for water power licenses to submit satisfactory evidence to the Commission that they possess the necessary water rights to operate the project as authorized in a license.

797(e)), even where the generation of power is not a significant aspect of the project's purpose (Pet. App. 15). In addition, the court upheld the Commission's determination that all of the licensed facilities are physical structures that are "used and useful" in connection with the power elements of the project (16 U.S.C. 796(11)) and thus within the scope of the Commission's jurisdiction (Pet. App. 16).

The court held, however, that under Section 8 of MIRA (26 Stat. 714),¹² petitioners are required to obtain from the LaJolla, Rincon and San Pasqual Indians right-of-way permits that are subject to the approval of the Secretary of the Interior, before they may utilize the project facilities that occupy those reservations. The court concluded that a private party must follow the procedures set forth in Section 8 of MIRA in order to obtain a right-of-way for a Commission-licensed water project across Mission Indian reservation lands. In so doing, the court rejected the Commission's argument that Section 29 of the FPA, 16 U.S.C. 823, which repealed all acts or parts of acts inconsistent with the FPA, pro tanto repealed Section 8 of MIRA. Relying on *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v.*

¹² Section 8 of MIRA provides in pertinent part:

Subsequent to the issuance of any tribal patent, or of any individual trust patent * * * any citizen of the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

FPC, 510 F.2d 198, 210-212 (D.C. Cir. 1975), the court concluded that the interference/inconsistency proviso of FPA Section 4(e)¹³ "would be meaningless if Congress meant to extinguish preexisting Indian rights whenever they came into conflict with the Commission[']s comprehensive jurisdiction over power projects on federal lands" (Pet. App. 21). The court further concluded that Section 8 of MIRA and the FPA do not conflict, explaining that "[w]here a project requiring a license * * * crosses lands to which MIRA applies, the operator of that project is required both to obtain a license from the Commission, and to obtain the necessary right-of-way by the method provided in section 8 of MIRA" (Pet. App. 21).

In addition, the court of appeals held that the Commission lacked authority to reject or modify any of the license conditions propounded by the Secretary of the Interior pursuant to Section 4(e) of the FPA (Pet. App. 22-25).¹⁴ The court rejected the argument that its interpretation of Section 4(e) conflicts with the Commission's obligation under Section 10(a) of the FPA, 16 U.S.C. 803(a), to approve a project that will be the "best adapted to a comprehensive plan" for the utilization of waterways and the development of

¹³ That proviso states that the Commission must find that the "license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired * * *."

¹⁴ Section 4(e) provides in pertinent part:

licenses * * * issued within any reservation * * * shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations * * *.

power. The court concluded that Sections 4(e) and 10(a) are not inconsistent, reasoning (Pet. App. 24):

In the case of a project within a reservation, once the Secretary of the Interior has propounded those conditions deemed necessary for the protection and utilization of the reservation, the Commission is free to modify the proposal in other ways, but not by altering or omitting Interior's conditions, to make it feasible and beneficial to the public. If this cannot be done, the Commission may decline to issue a license at all.

The court also rejected the claim that its construction of Section 4(e) would give the Secretary of the Interior an "unconditional veto power" over licensing authority, noting that any license issued by the Commission that includes conditions propounded by the Secretary would be subject to judicial review pursuant to Section 313(b) of the FPA, 16 U.S.C. 825l(b) (Pet. App. 24-25, as amended at Pet. App. 32-33).

Finally, the court held that for purposes of Section 4(e), the license is not only "within" the three reservations (LaJolla, Rincon and San Pasqual) that the project traverses, but it is also "within" the other three reservations (Pala, Pauma and Yuima) that may be affected by the project because of their geographical location downstream from the project in the San Luis Rey River watershed. The court noted that the definition of "reservation" in the FPA includes "interests in lands" owned by the United States and reserved from private appropriation under public land laws (16 U.S.C. 796(2)), and it concluded that the water rights of the Pala, Pauma and Yuima Bands come within this definition (Pet. App. 25-26). Although it acknowledged that the use of the phrase

"licenses * * * *within* any reservation" suggests that a project must be physically situated on a reservation before the provisions of Section 4(e) come into play, the court stated that it would resolve any ambiguity in the statute in favor of the Indians. The court reasoned (Pet. App. 27-28):

A water project may occupy a geographical portion of an Indian reservation without impinging in any serious way on Indian interests—e.g., by crossing a corner of the reservation with a power line or an access lane. Conversely, a project may turn a potential useful reservation into a barren waste without ever crossing it in the geographical sense—e.g., by diverting the waters which would otherwise flow through or percolate under it. We will not attribute to Congress, on account of the mere presence in its enactment of one ambiguous word, the perverse and illogical intention of guarding carefully against the former danger while openly embracing the latter.

b. On petitions for rehearing, Judge Anderson dissented from portions of the panel's original opinion (Pet. App. 33-41). Noting that the FPA itself contains a pervasive scheme for obtaining rights-of-way over tribal lands and that the legislative history of the FPA shows that Congress rejected an amendment that would have required tribal consent before a license could be issued for projects affecting certain tribal lands, Judge Anderson concluded that Section 8 of MIRA cannot be considered as establishing a prerequisite for obtaining rights-of-way for FPA-licensed projects over Mission Indian reservation lands (Pet. App. 34-37). Furthermore, Judge Anderson concluded that, although the Secretary of the Interior's Section 4(e) conditions must be included in a

license to the extent they are reasonable, the responsibility for making the initial reasonableness determination should rest with the Commission, rather than the Secretary or the reviewing court (Pet. App. 40-41).

ARGUMENT

This case presents several questions of potential importance concerning the proper roles of the Federal Energy Regulatory Commission, the Secretary of the Interior and affected tribes in the context of an application for a license to operate a hydroelectric project on Mission Indian reservation lands. As already noted, when the case was in the court of appeals the Secretary and the Commission expressed opposing views with respect to these questions. The Secretary and the Commission adhere to their previously expressed positions on the merits of the questions presented in the petition. For our part, however, we believe it unnecessary to resolve those differences here because, in any event, the case does not warrant review by this Court.

We are guided by the following considerations. The questions presented involve the construction of statutory provisions that had not previously been construed differently by any other court in this context. There is, therefore, no present conflict with the decisions of this Court or of the other courts of appeals that requires resolution. Moreover, although the court of appeals upheld the Commission's assertion of jurisdiction over the project involved here, it nevertheless is relevant, in our view, that the project is essentially a water conveyance facility with insignificant power production capacity. Accordingly, we believe that this case is not a suitable vehicle for deciding the issues concerning the scope of the Federal

Power Act. Furthermore, although petitioners argue that the court's decision will have a "profound[] impact [on] many major projects due for relicensing" (Pet. 7; footnote omitted), the Commission treated this case as an initial licensing proceeding, rather than a relicensing proceeding. Thus, it is doubtful whether future problems of significant proportions are likely to arise from application of the decision below in the context of relicensing proceedings. If such problems do in fact arise in cases involving major power projects, there will be time enough to deal with them.

1. Contrary to petitioners' assertions (Pet. 11-13, 16-17), the court of appeals' decision does not conflict with any decisions of this Court. The court's holdings that the FPA's Section 4(e) interference/inconsistency proviso incorporates MIRA's Section 8 right-of-way requirements, that the Secretary of the Interior's Section 4(e) conditions may not be modified or rejected by the Commission, and that those conditions may extend to reservations that are not physically occupied by the project but whose water rights may be affected by the project, all turn on statutory construction issues of first impression in this Court.

None of the cases cited by petitioners specifically addressed the issues presented here. The question in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946), was whether Section 9(b) of the FPA, 16 U.S.C. 802(b), required an applicant to obtain a state permit for dam construction before it could seek a license from the Commission. The Court held that Section 9(b) did not incorporate the state permit requirements into the federal licensing scheme. Similarly, in *FPC v. Oregon*, 349 U.S. 435, 441-446

(1955), the Court concluded that the Commission had exclusive jurisdiction under the FPA to license a power project on reserved lands of the United States, and that the FPA did not require the applicant to secure the state's additional permission to construct and operate such a project. Neither of these cases involved any question concerning the proper interpretation of Section 4(e) of the FPA with regard to projects on Indian reservation lands.¹⁵

Although the decision in *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), which concerned the Commission's authority to license a project on Indian lands, contains broad language describing the Commission's authority under the FPA,¹⁶ that decision

¹⁵ Although part of the project involved in *FPC v. Oregon* was to be located on an Indian reservation, the Court observed (349 U.S. at 444) that the Indians had consented to the project. We note that *FPC v. Idaho Power Co.*, 344 U.S. 17 (1952), on which petitioners also rely (Pet. 17), similarly does not involve an interpretation of FPA Section 4(e).

¹⁶ The Court in *Tuscarora* stated (362 U.S. at 118):

The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. See § 4(e). It neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians—"tribal lands embraced within Indian reservations." See §§ 3(2) and 10(e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians.

also did not address the particular issues raised by petitioners. In *Tuscarora*, this Court concluded that certain lands that were owned in fee by the Indians and were proposed as a site for a hydroelectric project, were not within a "reservation" as that term is defined by the FPA because the United States owned no interest in them. 362 U.S. at 110-115. The Court therefore held that the Commission was not required to make a Section 4(e) interference/inconsistency determination because that proviso does not apply to non-reservation lands.

In short, the decision below involves statutory construction issues of first impression that have not yet been addressed by this Court. Unless the decision is likely to create significant problems in future cases, review by this Court would appear to be unwarranted.

2. Contrary to petitioners' claim (Pet. 11), there is no firm basis for concluding that the court of appeals' decision is likely to result in recurring problems of significant proportions in future relicensing cases. It is true that, of the 870 hydroelectric projects already licensed by the Commission, approximately 17 are located on Indian reservation lands.¹⁷ It is also true that Section 6 of the FPA, 16 U.S.C. 799, authorizes the Commission to issue licenses for up to 50 years and that, because the FPA was enacted in 1920, many projects that the Commission licensed on federal reservations are due for relicensing.

¹⁷ These 17 projects include major power facilities at Flatland Lake, Montana, with a capacity of 168 megawatts ("mw"), and at Pelton Oregon, with a capacity of 355 mw. (These figures were gleaned by a recent computer search of Commission records of hydroelectric licenses on file with the Commission.)

It is not at all certain, however, that the court of appeals' decision would apply to these projects. The Commission in the instant case elected to treat this proceeding as an initial licensing proceeding under Section 4(e) of the FPA, 16 U.S.C. 797(e), rather than as a relicensing proceeding under Section 15(a) of the Federal Power Act, 16 U.S.C. 808(a). It did so because it found that the project that Mutual sought to relicense was materially different from the project as originally licensed (Pet. App. 133, 136-137). If it is ultimately held that Section 4(e) does not apply in an ordinary relicensing proceeding,¹⁸ then the court of appeals' decision is unlikely to have any impact in the relicensing context.¹⁹

In any event, the court's ruling concerning the applicability of Section 8 of MIRA to the Commission's interference/inconsistency determination under FPA Section 4(e) is of direct significance only with respect to hydroelectric projects that require a right-of-way across Mission Indian reservation lands. Apart from

¹⁸ The Secretary of the Interior and the Bands maintained in the administrative proceeding that Section 4(e) applies in a relicensing proceeding because Section 15(a) specifically incorporates the "terms" of "existing laws." In its decision below, the Commission found it unnecessary to address the question because it treated this action as an original licensing, rather than a relicensing, proceeding (Pet. App. 133-137 & n.136).

¹⁹ Although petitioners contend (Pet. 17 n.24) that the Commission erred in treating this case as an original licensing proceeding, rather than a relicensing proceeding, petitioners did not preserve this objection in their application for rehearing before the Commission and thus it is not properly before this Court. 16 U.S.C. 825l(b). At all events, any uncertainty concerning the status of the proceeding constitutes an additional factor militating against review here.

Project No. 176 at issue here, we are aware of no other such project.²⁰

In addition, even though the ruling that the Commission lacks authority to modify or reject the Secretary's Section 4(e) conditions has potentially broad applicability, we note that, historically, when the Commission has raised objections to particular conditions developed by the Secretary for the protection and utilization of reservations under his control, the Commission and the Secretary have been able to reach a mutually agreeable resolution. There is no reason to suppose that the inability of the Secretary and the Commission to resolve their differences in this case portends numerous irreconcilable differences in future cases.²¹

3. Finally, we believe that the peculiar facts of this case make it an inappropriate vehicle to test the scope of the Federal Power Act. As the Commission noted in its decision, this project is essentially a water conveyance facility (Pet. App. 132, 338). Power production is an insignificant aspect of the project; indeed, the ALJ described the amount of power produced by this project as not even equivalent to that produced by six modern automobiles (see *id.* at 13). In our view, the potentially important questions of

²⁰ We note that it is not at all clear whether treaties or statutes governing other Indian tribes that contain provisions similar to Section 8 of MIRA would necessarily be deemed incorporated into FPA Section 4(e) under the authority of the court's ruling in this case (see Pet. 14 n.21).

²¹ There is only one reported decision prior to this case involving a licensing proceeding in which the Commission was unable to resolve its differences with a Secretary with supervisory responsibility for a federal reservation. *Pacific Gas & Electric Co.*, 53 F.P.C. 523 (1975) (Secretary of Agriculture).

statutory construction presented here should not be resolved in a case involving a water conveyance project with inconsequential power capabilities.

Moreover, underlying the instant case is a dispute over water rights that is currently being litigated in the district court. Because, as the Commission acknowledged (Pet. App. 99), it has no jurisdiction to adjudicate water rights, those issues are not present here. Even so, the Commission has recognized that the outcome of the water rights litigation might necessitate changes in the instant license, and it made the entire licensing proceeding subject to reconsideration at the conclusion of that litigation (*id.* at 259). In a sense, then, it would be premature to review the instant licensing case before resolution of the water rights case.²²

For the foregoing reasons, we submit that the Court should adopt a "wait and see" approach. If the court of appeals' decision is found to produce significant problems in future cases by preventing the relicensing of major power projects, or if another circuit adopts a contrary view of the statute, review of the issues presented might well be warranted. Until then, however, there is no compelling need for this Court to address these issues.

²² We also note that the controversy over whether this case involves an initial licensing proceeding or a relicensing proceeding (see note 19, *supra*), makes this an unattractive case in which to review the questions presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1983

SEP 27 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-2056
IN THE

Supreme Court of the United States

October Term, 1982

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCON-
DIDO and VISTA IRRIGATION DISTRICT,

Petitioners,

vs.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA and PALA BANDS
OF MISSION INDIANS, and THE SECRETARY OF INTERIOR
in his Capacity as Trustee for said Bands,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

PETITIONERS' REPLY BRIEF.

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TABLE OF CONTENTS

	Page
Introduction	1
Argument	1
I.	
The Decision Below Affects Many Hydroelectric Projects	1
II.	
Contrary to the Bands' Allegations the Commission Did Reject Secretarial Conditions Prior to 1975	6
III.	
This Is an Appropriate Case in Which to Decide the Important Issues Raised by the Decision Below	8
A. The Size and Nature of the Project Are Irrel- evant	8
B. The Interlocutory Posture of the Case Is Ir- relevant	9
Conclusion	1

TABLE OF AUTHORITIES

Cases	Page
Arizona Power Authority (1968) 39 FPC 955	7
Capital Development Co., Project 6982 (1983) 23 FERC ¶62,267	5
Cascade Waterpower Dev. Corp., Projects 3427, 3867, 4136 (1982) 18 FERC ¶61,247	4
Chris Williams, Project 7111 (1983) 24 FERC ¶62,141	5
City and County of Denver, Project 2035 (1951) 10 FPC 766	8
City of Seattle, Washington, Project 2959 (1980) 13 FERC ¶61,010	4
City of Seattle, Washington, Project 2795 (1979) 7 FERC ¶61,043	4
City of Tacoma, Project 4014 (1981) 17 FERC ¶61,172	4
City of Tacoma, Project 460 (1978) 3 FERC ¶61,033	4
City of Yakima, Project 6857 (1983) 22 FERC ¶62,425	5
Consolidated Hydroelectric, Inc., Projects 4261, 5178 (1983) 22 FERC ¶61,122	4
Dep't of Water Resources of State of California, Project 2426 (1974) 51 FPC 529	8
Ernest H. Altice, Project 5371 (1983) 23 FERC ¶62,040	4
Escondido Mutual Water Co., Project No. 176 (1983) 6 FERC ¶63,008	2
Federal Energy Regulatory Comm'n v. San Pasqual Band of Mission Indians et al., Docket A-970	1
Federal Power Comm'n v. Idaho Power Co. (1952) 344 U.S. 17, reh'g denied (1952) 344 U.S. 910	7

	Page
Georgia Pacific Corp., Project 4158 (1981) 15 FERC ¶62,317	4
Georgia Pacific Corp., Project 4286 (1981) 16 FERC ¶62,242	4
Glacier Energy Co., Project 4437 (1982) 21 FERC ¶61,209	4
Graves, Arkoosh and Arkoosh, Project 6707 (1983) 23 FERC ¶62,195	5
Idaho Power Co. v. Federal Power Comm'n (1965, 9th Cir.) 346 F.2d 956, cert. denied (1965) 382 U.S. 9-57	7
Kittitas County Public Utility Dist. No. 1, Projects 3489, 4207 (1981) 15 FERC ¶62,342	4
Lac Courte Oreilles Band v. Federal Power Comm'n (1975 D.C. Cir.) 510 F.2d 198	7
Mason County Public Utility Dist. No. 3, Project 7018 (1983) 23 FERC ¶62,240	5
Mason County Public Utility Dist. No. 3, Project 4217 (1981) 15 FERC ¶62,416	4
Mason County Public Utility Dist. No. 3, Project 4089 (1981) 15 FERC ¶62,365	4
Mason County Public Utility Dist. No. 3, Project 4258 (1981) 15 FERC ¶62,362	4
Lawrence J. McMurtrey, Project 6307 (1983) 23 FERC ¶61,246	4
Lawrence J. McMurtrey, Project 6338 (1983) 24 FERC ¶61,074	5
Mitex, Inc., Projects 3725, 4528, 4903 (1982) 20 FERC ¶62,255	4
Mitchell Energy Co., Inc., Project 3733 (1981) 15 FERC ¶62,058	4

	Page
Montana Power Co., Project 5 (1983) 24 FERC ¶61,088	2
Montana Power Co., Project 5 (1983) 23 FERC ¶61,464	2
Montana Power Co., Project 2301 (1976) 56 FPC 2008	7
Northern States Power Co., Project 108 (1980) 13 FERC ¶61,055	2
Northern Wasco County People's Utility Dist., Project 7076 (1983) 24 FERC ¶62,138	5
Pacific Gas & Electric Co. Project 77 (1983) 23 FERC ¶63,050	3
Pacific Gas & Electric Co., Projects 233, 2735 (1981) 14 FERC ¶61,179	3
Pacific Gas & Electric Co., Project 184 (1980) 13 FERC ¶62,269	4
Pacific Gas & Electric Co. (1975) 53 FPC 523	6
Pacific Gas & Electric Co., Project 1962 (1947) 6 FPC 729	6, 7
Portland General Electric Co., Project 2030 (1982) 20 FERC ¶61,294	2
Public Service Co. of New Mexico, Docket EL 79-18 (1980) 10 FERC ¶61,273	3
Public Utility Dist. No. 1 of Douglas County, Washington (1962) 28 FPC 128	2
Public Utility Dist. No. 1 of Ferry County, Washington, Project 4471 (1982) 20 FERC ¶61,256	3
Public Utility Dist. of Grays Harbor County, Project 3173 (1981) 15 FERC ¶62,074	4
Public Utility Dist. No. 1 of Okanogan County, Project 2062 (1983) 22 FERC ¶62,262	4

	Page
Public Utility Dist. No. 1 of Pend Oreilles County, Washington (1952) 11 FPC 786	2
Public Utility Dist. No. 1 of Snohomish County, Project 2157 (1981) 17 FERC ¶61,056	4
Puget Sound Power & Light Co., Project 2494 (1978) 4 FERC ¶61,144	4
Roza Irrigation Dist., Project 4890 (1983) 24 FERC ¶62,192	4
Roza Irrigation Dist., Projects 3484, 3485, 3486, 3487, 3488, 4172 (1981) 17 FERC ¶61,082	4
Sierra Pacific Power Co. v. Federal Energy Regulatory Comm'n (1982 9th Cir.) 681 F.2d 1134, cert. denied (1983) — U.S. —, 51 U.S.L.W. 3756	2
Southern California Edison Co., Project 344 (1983) 23 FERC ¶61,240	3
Southern California Edison Co., Project 120 (1981) 14 FERC ¶61,022	2
Southern California Edison Co., Project 1930 (1949) 8 FPC 364	7
Swinomish Tribal Community v. Federal Energy Reg- ulatory Comm'n (1980 9th Cir.) 627 F.2d 499	3
Town of Skykomish, Projects 6396, 6525 (1983) 23 FERC ¶62,039	5
Turlock Irrigation Dist., Project 2299 (1964) 31 FPC 510, aff'd (1965 9th Cir.) 345 F.2d 917, cert. denied (1965) 382 U.S. 941	8
Washington Water Power Co., Project 2545 (1981) 15 FERC ¶61,039	3
Yakima-Tieton Irrigation Dist., Project 3701 (1981) 17 FERC ¶61,171	4

	Page
Statutes	
Federal Power Act §3(2), 16 U.S.C. §796(2)	5
Federal Power Act §4(e), 16 U.S.C. §797(e)	5, 6, 9
Federal Power Act §14, 16 U.S.C. §807	6
Federal Power Act §15(a), 16 U.S.C. §808(a)	6
Federal Power Act §313(a), 16 U.S.C. §8251(a)	6
Legislative Materials	
56 Cong. Rec. 9911 (1918)	8
Miscellaneous	
11 FPC Ann. Rep. (1931)	5
35 FPC Ann. Rep. (1955)	2
Textbook	
Herron, "The Rush Is on to Find New Gold in Falling Water," 13 Smithsonian 87 (December 1982)	2

No. 82-2056

IN THE

Supreme Court of the United States

October Term, 1982

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCON-
DIDO and VISTA IRRIGATION DISTRICT,

Petitioners,

vs.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA and PALA BANDS
OF MISSION INDIANS, and THE SECRETARY OF INTERIOR
in his Capacity as Trustee for said Bands,

Respondents.

PETITIONERS' REPLY BRIEF.

Introduction.

This petition was filed June 15, 1983. The Joint Board of Control of the Flathead, Mission and Jocko Valley Irrigation Districts of the Flathead Irrigation Project, Montana, the American Public Power Association, and the Colorado River Conservation District and Kings River Conservation District have filed amicus briefs supporting the petition.

Respondents, the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians (Bands), filed a Brief in Opposition, and on September 21, 1983, the Solicitor General filed a Brief for the Federal Respondents¹ in Opposition.

The thrust of the opposition is that the case is not worthy. Indeed the Solicitor ignored the merits altogether. The merits of the case are relatively easy. Justice Anderson's dissent adequately explains why the Ninth Circuit majority was wrong. This Reply corrects material misstatements and explains why the efforts to minimize the impact of this case are unsupportable and incorrect.

ARGUMENT.

I.

The Decision Below Affects Many Hydroelectric Projects.

The Bands attempt to minimize the impact of the Ninth Circuit decision by stating that only eight power projects "are located on Indian lands or adversely affect Indian water rights." (Bands' Opp. at 21.)

¹In fact, the Federal Energy Regulatory Commission (Commission) did not oppose the petition, but on June 28, 1983, requested the Solicitor General to file a petition. The Solicitor General obtained an extension of time until July 30, 1983, to file a petition (see Orders dated June 6 and July 8, 1983, *Federal Energy Regulatory Comm'n v. San Pasqual Band of Mission Indians et al.*, Docket A-970), but did not file one.

The Bands' reliance on a 1972 letter is misplaced. The letter, which listed eight projects² occupying Indian tribal lands or affecting Indian water rights, and twenty transmission line projects using Indian tribal lands, was non-comprehensive.³ It also was written nearly twelve years ago. Since that date, the number of projects and project applications has dramatically increased,⁴ and the Indians and Interior have taken a more aggressive posture with respect to Indian land, water and fishing rights. See, e.g., *Sierra Pacific Power Co. v. Federal Energy Regulatory Comm'n* (1982 9th Cir.) 681 F.2d 1134, 1136, cert. den. (1983) — U.S. —, 51 U.S.L.W. 3756 (Pyramid Lake Paiute Tribe alleged that Sierra was operating without a license

²Montana Power Co., Project 5; Northern States Power Co., Project 108; Escondido Mutual Water Co., Project 176; Moon Lake Electric Ass'n., Inc., Project 190; Portland General Electric Co., Project 2030; Arizona Power Authority, Project 2573; Southern California Edison Co., Project 120; Moon Lake Electric Ass'n, Inc., Project 1773.

The involvement of some of these projects with Indian Lands is a continuing source of controversy. See, e.g., *Montana Power Co., Project 5* (1983) 24 FERC ¶61,088 (Indians filed competing application for a new license); *Montana Power Company, Project 5* (1983) 23 FERC ¶61,464 (Indians petitioned to increase annual charges during period of annual licenses); *Portland General Electric Co., Project 2030* (1982) 20 FERC ¶61,294 (Indians awarded increased annual charges); *Southern California Edison Co., Project 120* (1981) 14 FERC ¶61,022 (licensee relieved of obligation to relocate certain telephone and transmission lines upon payment of \$185,000 to Indians); *Northern States Power Co., Project 108* (1980) 13 FERC ¶61,055 (Controversy with Indians over new license for the project).

³The letter omitted project 2042 which uses allotted lands within the Calispel Indian reservation (See *Public Utility Dist. No. 1 of Pend Oreille County, Washington* (1952) 11 FPC 786); and project 2149 which uses Colville Indian reservation tribal lands (See *Public Utility Dist. No. 1 of Douglas County, Washington* (1962) 28 FPC 128.) There may have been additional omissions. The last Commission Annual Report which listed licensees who paid annual charges for the use of Indian lands was in 1955. Eighteen of the Projects listed in 1955 (see 35 FPC Ann. Rep. 230-237 (1955)) were not mentioned in the 1972 letter.

⁴See Herron, "The rush is on to find new gold in falling water," 13 *Smithsonian* 87 (December 1982) (pointing out 1800 applications for hydroelectric projects were filed in 1981 compared to 18 in 1978).

and that the project interfered with the tribe's fishing rights); *Swinomish Tribal Community v. Federal Energy Regulatory Comm'n* (1980 9th Cir.) 627 F.2d 499, 506 (Swinomish Tribal Community, Upper Skagit tribe and Sauk-Suiattle tribe alleged that City of Seattle's project 553 interfered with treaty fishing rights); *Southern California Edison Co., Project No. 344* (1983) 23 FERC ¶61,240 (Agua Caliente Band of Mission Indians contended relicensing of project would interfere with its groundwater rights); *Pacific Gas & Electric Co., Project 77* (1983) 23 FERC ¶63,050 (Covelo Indian Community contended that relicensing of project would interfere with its fishing rights); *Public Utility Dist. No. 1 of Ferry County, Washington, Project 4471* (1982) 20 FERC ¶61,256 (Confederated Tribes of Colville Reservation opposed preliminary permit arguing that an 1891 agreement gave the tribes exclusive rights to use all water power in the area); *Washington Water Power Co., Project 2545* (1981) 15 FERC ¶61,039 (Coeur d'Alene and Spokane Indian tribes contended that the company lacked title to Indian land occupied by its project); *Pacific Gas & Electric Co., Projects 233, 2735* (1981) 14 FERC ¶61,179 (Pitt River Indians of California intervened in relicensing proceeding claiming "Indian Title" to the project lands); see also *Public Service Co. of New Mexico, Docket EL 79-18* (1980) 10 FERC ¶61,273 (Interior on behalf of the Laguna Indian Pueblo and the Canocito Band of Navaho Indians requested that the Commission exercise jurisdiction over a proposed pumped storage project alleging that the project would affect the quantity and quality of their groundwater). Regardless of what impact the Ninth Circuit decision might have had in 1972, it is clear that it will have serious and

widespread consequences today.⁵

⁵A review of reported Commission proceedings during just the last five years has disclosed over 40 additional projects or proposed projects that are alleged to affect specific Indian lands, water or fishing rights. See, e.g., *Pacific Gas & Electric Co., Project 184* (1980) 13 FERC ¶62,269 (Pyramid Lake Paiute Tribe fishing and water rights); *City of Tacoma, Project 460* (1978) 3 FERC ¶61,033 (Skokomish Indian Tribe fishing and water rights); *Public Utility District No. 1 of Chelan County, Project 943* (1982) 21 FERC ¶61,264 (Yakima Indian Nation fishing rights); *Public Utility Dist. No. 1 of Okanogan County, Project 2062* (1983) 22 FERC ¶62,262 (Yakima Indian Nation fishing rights); *Public Utility Dist. No. 1 of Snohomish County, Project 2157* (1981) 17 FERC ¶61,056 (Tulalip Indian Tribe fishing rights); *Puget Sound Power & Light Co., Project 2494* (1978) 4 FERC ¶61,144 (Muckleshoot Indian Tribe fishing rights); *City of Seattle, Washington, Project 2795* (1979) 7 FERC ¶61,043 (Upper Skagit, Sauk-Suiattle and Swinomish Indian Tribes fishing rights); *City of Seattle, Washington, Project 2959* (1980) 13 FERC ¶61,010 (Tulalip Indian Tribe fishing rights); *Public Utility Dist. of Grays Harbor County, Project 3173* (1981) 15 FERC ¶62,074 (Quinalt and Chehalis Indian Tribes fishing rights); *Cascade Waterpower Dev. Corp., Projects 3427, 3867, 4136* (1982) 18 FERC ¶61,247 (Confederated Tribes of Umatilla Indian reservation fishing rights); *Roza Irrigation Dist., Projects 3484, 3485, 3486, 3487, 3488, 4172* (1981) 17 FERC ¶61,082 (Yakima Indian Nation water and fishing rights); *Kittitas County Public Utility Dist. No. 1, Projects 3489, 4207* (1981) 15 FERC ¶62,342 (Yakima Indian Nation water and fishing rights); *Yakima-Tieton Irrigation Dist., Project 3701* (1981) 17 FERC ¶61,171 (Muckleshoot Tribes fishing rights); *Mitex, Inc., Projects 3725, 4528, 4903* (1982) 20 FERC ¶62,255 (Blackfeet Indian reservation lands); *Mitchell Energy Co., Inc., Project 3733* (1981) 15 FERC ¶62,058 (Tulalip, Puyallup, Muckleshoot, Susquamish & Yakima Indian Tribes fishing rights); *City of Tacoma, Project 4014* (1981) 17 FERC ¶61,172 (Tulalip Indian Tribe fishing rights); *Mason County Public Utility Dist. No. 3, Project 4089* (1981) 15 FERC ¶62,365 (Skokomish Indian Tribe fishing rights); *Georgia Pacific Corp., Project 4158* (1981) 15 FERC ¶62,317 (Lummi Indian Tribe fishing rights); *Mason County Public Utility Dist. No. 3, Project 4217* (1981) 15 FERC ¶62,416 (Skokomish Indian Tribe fishing rights); *Mason County Public Utility Dist. No. 3, Project 4258* (1981) 15 FERC ¶62,362 (Skokomish Indian Tribe fishing rights); *Georgia Pacific Corp., Project 4286* (1981) 16 FERC ¶62,242 (Upper Skagit and Sauk-Suiattle Indian Tribes, and Swinomish Tribal Community fishing rights); *Consolidated Hydroelectric Inc., Projects 4261, 5178* (1981) 22 FERC ¶61,122 (Hoopa Valley Tribe's water and fishing rights); *Glacier Energy Co., Project 4437* (1982) 21 FERC ¶61,209 (Upper Skagit and Sauk-Suiattle Indian Tribes fishing rights); *Roza Irrigation Dist., Project 4890* (1983) 24 FERC ¶62,192 (Yakima Indian Nation water rights); *Ernest H. Altice, Project 5371* (1983) 23 FERC ¶62,040 (Yakima Indian Nation water rights); *Lawrence J.*

The Solicitor also attempts to minimize the effect of the Ninth Circuit decision, stating that "approximately" 17 projects are located on Indian reservations lands (Sol. Opp. at 17); however, he ignored the broad force of the Ninth Circuit decision which allows secretarial conditions to be imposed on projects affecting Indian reservations. As discussed above, there may be well over 150 such projects. Moreover, he completely ignores the hundreds of projects located on or affecting other federal reservations.⁶

He also implies that the Ninth Circuit's holding will have little precedential value because the Commission acted as if it were faced with an initial licensing as opposed to a relicensing. (Sol. Opp. at 15, 18) The Solicitor is wrong.

McMurtrey, Project 6307 (1983) 23 FERC ¶61,246 (Upper Skagit Indian Tribe, Swinomish Tribal Community, and Sauk-Suiattle Indian Tribe fishing rights); *Lawrence J. McMurtrey, Project 6338* (1983) 24 FERC ¶61,074 (Upper Skagit Indian Tribe, Swinomish Tribal Community, and Sauk-Suiattle Indian Tribe treaty rights); *Town of Skykomish, Projects 6396, 6525* (1983) 23 FERC ¶62,039 (Tulalip Indian fishing rights); *Graves, Arkoosh and Arkoosh, Project 6707* (1983) 23 FERC ¶62,195 (Shoshone-Bannock Tribe fishing rights); *City of Yakima, Project 6857* (1983) 22 FERC ¶62,425 (Confederated Tribes & Band of Yakima Indian Nation fishing rights); *Capital Dev. Co., Project 6982* (1983) 23 FERC ¶62,267 (Upper Skagit Indian Tribe, Swinomish Tribal Community & Sauk-Suiattle Indian Tribe fishing rights).

The alleged impact of projects on Indian fishing rights has become so prevalent that since 1978 the Commission has inserted language in over 100 additional preliminary permits requiring consultation with any Indian tribes whose fishing rights may be affected. See e.g., *Northern Wasco County People's Utility Dist., Project 7076* (1983) 24 FERC ¶62,138; *Chris Williams, Project 7111* (1983) 24 FERC ¶62,141; *Mason County Public Utility Dist., Project 7018* (1983) 23 FERC ¶62,240.

"The Bands also question the Commission's figure of 606 projects that utilize federal lands and reservations. (Bands' Opp. at 24 n. 19) The Commission's inability to file its own brief makes it impossible to verify that figure; however, its 1931 Annual Report (the last year in which the annual reports identified the type of lands affected by existing or proposed projects) listed 409 projects as affecting "national forests." See 11 FPC Ann. Rep. 213-240 (1931).

National forests are "reservations." (See FPA §3(2), 16 U.S.C. §796(2)), and would be subject to the Ninth Circuit's section 4(e) rulings.

The proceedings before the Commission were always treated as a relicensing. Since 1974 Mutual has operated the project with annual licenses issued under section 15(a). (Pet. App. at 44) During the proceedings the Commission rejected Interior's take-over recommendation under section 14 (Pet. App. at 109-16), and on rehearing determined net investment and severance damages. (Pet. App. at 312-27) Although by including Henshaw Dam the "project works" were expanded, the project, as such, did not change at all. The "new" (not "initial") license issued to Petitioners was "for the continued operation and maintenance of Escondido Project 176." (Pet. App. at 253)⁷

II.

Contrary to the Bands' Allegations the Commission Did Reject Secretarial Conditions Prior to 1975.

The Bands concede that in *Pacific Gas & Electric Co.*, (1975) 53 FPC 523, 526, the Commission rejected a secretarial condition imposed pursuant to the reservation proviso; however, they allege that this was not consistent with prior Commission practice. Their contention that prior to 1975 the Commission had never rejected conditions proposed by a secretary (Bands' Opp. at 20), is wrong. See, e.g., *Pacific Gas & Electric Co.*, Project 1962 (1947) 6

⁷What, no doubt, confused the Solicitor was the Commission's section 4(e) discussion. The Commission inexplicably (and erroneously) indicated that section 4(e) applied because the action "is partly an initial licensing of the Henshaw facilities and partly a relicensing of the presently licensed Project 176 facilities . . ." (Pet. App. at 136). Since even applying the section 4(e) provisions, the Commission licensed the Petitioners' project, it was neither necessary nor appropriate, for the Petitioners to seek rehearing on that point. (See FPA §313(a), 16 U.S.C. 8251(a) (for a party to file a petition for rehearing, he must be "aggrieved")) Petitioners did discuss the applicability of sections 4(e) and 15(a) in the Ninth Circuit brief supporting the Commission on the Interior veto issue. (See Brief for Respondent, Escondido Mutual, et al. at 66-74)

FPC 729, 730 (Commission rejected conditions "recommended" by Agriculture for the protection of fish); *Southern California Edison Co., Project 1930* (1949) 8 FPC 364, 367-68 (Commission rejected condition recommended by Agriculture to require a minimum water flow).

Contrary to the Bands' implication (Bands' Opp. at 20-21) the Commission continued its practice after the decision in *Lac Courte Oreilles Band v. FPC* (1975 D.C. Cir.) 510 F.2d 198. See, e.g., *Montana Power Co., Project No. 2301* (1976) 56 FPC 2008, 2011-12, (Commission rejected condition requested by Agriculture that a license term be limited to twenty years).

The Bands misstate the ruling in *Arizona Power Authority* (1968) 39 FPC 955 (Bands' Opp. at 18-19), by ignoring the Commission's rejection of a condition that would have required secretarial approval of changes in annual charges or use of Indian water. (39 FPC at 960)

In short, the Commission has several times⁸ modified or rejected conditions proposed by various secretaries for inclusion in project licenses.⁹ Until this case, the secretaries have acquiesced in the Commission's practice. Thus, the Ninth Circuit's holding effects a radical shift in power from the Commission to the various secretaries. Unlike in the past, where the various secretaries and the Commission compromised to balance competing interests (see Sol. Opp.

⁸Commission reports are poorly indexed, making research difficult. Petitioners are confident, however, that had it been permitted to file its own brief, the Commission could have documented numerous other instances.

⁹In addition, in referring to opinions of the Secretary of Interior regarding the necessity of imposing certain conditions on licenses issued pursuant to §4(e), courts have spoken in terms of "recommended" (*Idaho Power Co. v. Federal Power Comm'n* (1965 9th Cir.) 346 F.2d 956, 958, cert. den. (1965) 382 U.S. 957), and "suggestion" (*Federal Power Comm'n v. Idaho Power Co.* (1952) 344 U.S. 17, 19, reh'g den. (1952) 344 U.S. 910).

at 19), the secretaries now will have no incentive to compromise.

III.

This Is an Appropriate Case in Which to Decide the Important Issues Raised by the Decision Below.

A. The Size and Nature of the Project Are Irrelevant.

The assertions that the project's power production is small¹⁰ and its purpose is primarily for irrigation¹¹ (Bands' Opp. at 2, 26; Sol. Opp. at 2, 14, 19, 20) do not detract from the importance of the issues raised in the petition.

The litigation involving Project 176 has spanned more than twelve years and cost millions of dollars. Every issue has been fully litigated. The Reporter's Transcript of the Commission's proceedings fills 53 volumes containing 11,149 pages.

¹⁰The comparison to power produced "by half a dozen modern automobiles" (Pet. App. at 13) is misleading. While at that time the Project's generating capacity was only 760 kilowatts (1018 horsepower), a hydroelectric plant can operate 24 hours a day, 365 days a year. For the period 1923-1970 project power generation averaged over 4,000,000 kilowatt hours per year, the equivalent of 6,340 barrels of oil or 37,800,000 cubic feet of natural gas. (Pet. App. at 96)

Much of the renewed emphasis on hydroelectric generation is on the use of small hydro plants similar to Project 176. See e.g., Herron, note 4, *supra* (new small hydro projects at 2000 sites could add 45,000 megawatts of generating capacity (the equivalent of 45 nuclear power plants) by the turn of the century).

¹¹Power production is incidental to many power projects in the West. See, e.g., *City and County of Denver, Project 2035* (1951) 10 FPC 766, 768; *Turlock Irrigation Dist., Project 2299* (1964) 31 FPC 510, 562, *affirmed* (1965 9th Cir.) 345 F.2d 917, 920, cert. den. (1965) 382 U.S. 941; *Dep't of Water Resources of State of California, Project 2426* (1974) 51 FPC 529, 533. During a 1918 debate on the Federal Power Act, Congressman Raker emphasized the importance of irrigation in western water power projects when he stated:

"I simply make again this assertion, that there is not a project constructed in the West, and there never will be one as long as the earth revolves as it does and the climate continues as it is, so that irrigation is necessary, when you build a dam for a reservoir, where from 50 to 90 percent of the construction will not be justified for irrigation alone." (56 Cong. Rec. 9911-12 (1918))

The three amicus briefs filed in support of this petition illustrate the widespread concern created by the Ninth Circuit's decision. More significantly, the Commission, the body charged with interpreting and applying the Federal Power Act, believed that review by this Court was warranted.

B. The Interlocutory Posture of the Case Is Irrelevant.

The contentions that this case is in an "interlocutory" posture (Bands' Opp. at 5; Sol. Opp. at 20) are irrelevant.

This case presents a worst-case scenario. If the Commission can be forced to accept Interior's conditions — conditions intended to destroy the project (see 6 FERC ¶63,008)¹² — it will have to accept every condition proposed by any secretary in the future, no matter how irrational or how parochial. The issue is not the reasonableness of Interior's conditions, but whether the Commission is bound to accept them regardless of their reasonableness. This issue will not be clarified on remand.

Nor will remand clarify the Ninth Circuit's MIRA §8 holding. The Commission will have to require Petitioners to obtain Indian consent for their project rights-of-way. It is certain that such consent will be withheld.

The pendency of the water rights litigation between the Bands and Petitioners is even more irrelevant. The outcome of that dispute will not affect the Ninth Circuit's section 4(e) and MIRA §8 holdings.

¹²The Bands' assertion that Interior's proposed conditions were never found to be unreasonable, arbitrary or capricious when judged against whether they were "necessary for the adequate protection" of the reservations (Bands' Opp. at 3-4), is incorrect. The Commission found that Project No. 176 *as conditioned by it* neither interfered nor was inconsistent with the purposes for which the reservations occupied by the project were established. (Pet. App. at 174, 176)

Conclusion.

This case *is* cert-worthy and the Ninth Circuit's decision *is* erroneous.¹³ If remanded, the Ninth Circuit's decision may well destroy project 176 — a project which the Commission found "best adapted to a comprehensive plan for beneficial public uses. . . ." (Pet. App. at 130) More importantly its decision could cripple all future hydroelectric development in the West.

This Court should return control in this vital area to the Commission, which unlike the Bands and Interior (see Pet. at 18) will, as Congress intended, base its decisions on broad national interests and policies that include "the kind of fairness, the kind of balancing of interests that normally goes on in the political process."

Dated: September 26, 1983.

Respectfully submitted,

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¹³In his brief, the Solicitor General did not discuss the merits. Petitioners are confident, however, that were it not for the conflict between Interior and the Commission (see Sol. Opp. at 14), the Solicitor would have agreed with Petitioners that the Ninth Circuit erred.

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NO. 82-2056

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ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

ESCONDIDO MUTUAL WATER COMPANY,
CITY OF ESCONDIDO
AND VISTA IRRIGATION DISTRICT,
PETITIONERS,

v.

LaJOLLA, RINCON, SAN PASQUAL, PAUMA and
PALA BANDS OF MISSION INDIANS,
AND THE SECRETARY OF INTERIOR
IN HIS CAPACITY AS TRUSTEE
FOR SAID BANDS,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE
AMERICAN PUBLIC POWER ASSOCIATION
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF INTEREST OF AMERICAN PUBLIC POWER ASSOCIATION	2
REASONS FOR GRANTING CERTIORARI	5
I. THIS DECISION RESOLVES A CONFLICT OF EXTREME IMPORTANCE BETWEEN GOVERNMENTAL AGENCIES IN A FASHION WHICH WILL FRUSTRATE A PRIMARY STATUTORY OBJECTIVE IMPORTANT TO PUBLIC POLICY	5
II. THE NINTH CIRCUIT'S DECISION, DESPITE THE COURT'S DENIAL, ALLOWS A SECRETARY TO VETO THE ISSUANCE OF A LICENSE BY THE COMMISSION, CONTRARY TO THE ACT AND CONGRESSIONAL INTENT	11
A. The Ninth Circuit's Construction Of The Reservation Proviso Gives A Secretary Veto Power	11
B. The Court Below Improperly Dismissed Evidence Of Longstanding Administrative Practice And Congressional Acquiescence Indicating The Absence Of A Secretarial Veto	16
C. The Ninth Circuit's Simplistic "Plain Meaning" Construction Will Lead To A Procedural Morass	22

III.	THE DECISION BELOW SANCTIONS THE MISUSE OF LICENSING PROCEEDINGS TO ADJUDICATE WATER RIGHTS	27
IV.	THE COURT'S CONSTRUCTION OF THE PHRASE "WITHIN ANY RESERVATION" IS CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE AND EXTENDS THE SCOPE OF SECRETARIAL POWER SO AS TO JEOPARDIZE THE COMMISSION'S LICENSING AUTHORITY	34
A.	The Court Below Misconstrued The Phrase "Within Any Reservation" To Include Reservation Lands With No Project Works	34
B.	Contrary To The Ninth Circuit's Ruling, The Commission's Construction Of Section 4(e) Would Not Lead To Absurd Results	41
C.	The Extension Of The Domain Of Secretarial Veto Power Is Plainly Improper.	42
	CONCLUSION	44

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<u>Arizona v. California</u> , 103 S. Ct. 1382, 74 L. Ed. 2d 318 (1983)	. 31, 35
<u>Cappaert v. United States</u> , 426 U.S. 128 (1976).	. 32
<u>Chapman v. Federal Power Commission</u> , 345 U.S. 153 (1953)	. 9
<u>Chemehuevi Tribe of Indians v. Federal Power Commission</u> , 420 U.S. 395 (1975)	. 18
<u>Colorado River Water Conservation District v. United States</u> , 424 U.S. 800 (1976).	. 10
<u>Commissioner v. Brown</u> , 380 U.S. 563 (1965)	. 23
<u>Compliance With State Laws</u> , 2d Ann. Rept. of the FPC 224 (1922)	. 28
<u>Escondido Mutual Water Co.</u> , 6 F.E.R.C. ¶63,008 (June 1, 1977), modified, 6 F.E.R.C. ¶61,189 (Feb. 26, 1979), rev'd, 692 F.2d 1223 (9th Cir. 1982), modified, 701 F.2d 826 (9th Cir. 1983)	. 15, 30
<u>Escondido Mutual Water Co.</u> , 6 F.E.R.C. ¶61,189 (Feb. 26, 1979), rev'd, 692 F.2d 1223 (9th Cir. 1982), modified, 701 F.2d 826 (9th Cir. 1983)	. <u>passim</u>
<u>Federal Power Commission v. Idaho Power Co.</u> , 344 U.S. 17 (1952)	. 42

TABLE OF AUTHORITIES - Continued

	<u>Page</u>
CASES - Continued	
<u>In Re McQuiston's Adoption,</u> 238 Pa. 304, 86 A. 205 (1913)	. 23
<u>NLRB v. Bell Aerospace Co.,</u> 416 U.S. 267 (1974)	. 16
<u>Niagara Falls Power Co.,</u> 1 F.P.C. 716 (1938).	. 28
<u>Pacific Gas & Electric Co.,</u> 6 F.P.C. 729 (1947).	. 21, 22
<u>Pacific Gas & Electric Co.,</u> 53 F.P.C. 523 (1975)	. 22
<u>Pigeon River Lumber Co.,</u> 1 F.P.C. 206 (1935)	. 15, 21
<u>Seneca Nation of Indians,</u> 6 F.P.C. 1025 (1947)	. 28
<u>Southern California Edison Co.,</u> 23 F.E.R.C. ¶61,240 (May 18, 1983), reh'g denied, 24 F.E.R.C. ¶61,119 (July 22, 1983)	. 30
<u>Swinomish Tribal Community v.</u> <u>Federal Energy Regulatory</u> <u>Commission,</u> 627 F.2d 499 (D.C. Cir. 1980)	. 23
<u>Trans Alaska Pipeline Rate Cases,</u> 436 U.S. 631 (1978)	. 23
<u>United States v. Public Utilities</u> <u>Commission,</u> 345 U.S. 295 (1953)	. 18
<u>United States v. Reeb,</u> 433 F.2d 281 (9th Cir. 1970)	. 23

TABLE OF AUTHORITIES - Continued

	<u>Page</u>
CASES - Continued	
<u>Winters v. United States,</u> 207 U.S. 564 (1908)	. 28
STATUTES	
Administrative Procedure Act, 5 U.S.C. §§701-706 (1976)	. 12, 26
Federal Power Act	
Section 3(2), 16 U.S.C. §796(2) (1976)	. 8, 37
Section 3(11), 16 U.S.C. §796(11) (1976)	. 37, 38
Section 3(12), 16 U.S.C. §796(12) (1976)	. 39
Section 4(e), 16 U.S.C. §797(e) (1976)	. <u>passim</u>
Section 6, 16 U.S.C. §799 (1976)	. 13
Section 9(b), 16 U.S.C. §802(b) (1970)	. 28
Section 10(a), 16 U.S.C. §803(a) (1976)	. 36, 41, 42
Section 15(a), 16 U.S.C. §808(a) (1976)	. 25
Section 17, 16 U.S.C. §810 (1976)	. 33

STATUTES - Continued

Section 23(b), 16 U.S.C.
§817 (1976) 40

Section 313(b), 16 U.S.C.
§8251(b) (1976) 14

Federal Water Power Act, Section
4(d), 49 Stat. 1840-41 6

MISCELLANEOUS

Comptroller General of the United
States, Improvements Needed In
Review of Public Land Withdrawals --
Lands Set Aside For Special Purposes
(1979) 8

Federal Power Commission: Hearings
on H.R. 11408 Before the House
Comm. on Interstate and Foreign
Commerce, 71st Cong., 2d Sess.
(1930) 20, 21

Investigation of Federal Regulation
of Power: Hearings Pursuant to
S. Res. 80 and on S. 3619 Before the
Senate Comm. on Interstate Commerce,
71st Cong., 2d Sess. (1930) 15, 19

2A Sands, Sutherland Statutory
Construction (1973) 23

2 U.S. Army Corps of Engineers,
Preliminary Inventory of Hydropower
Resources (1979) 9

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

No. 82-2056

ESCONDIDO MUTUAL WATER COMPANY,
CITY OF ESCONDIDO
and VISTA IRRIGATION DISTRICT,

Petitioners,

v.

LaJOLLA, RINCON, SAN PASQUAL, PAUMA and
PALA BANDS OF MISSION INDIANS,
and THE SECRETARY OF INTERIOR
in his capacity as trustee
for said Bands,

Respondents.

On Petition for Writ of Certiorari
to the United States Court
of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE
AMERICAN PUBLIC POWER ASSOCIATION
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

Consent from counsel for all parties to
the filing of this brief has been filed
with the Clerk of this Court.

STATEMENT OF INTEREST OF
AMERICAN PUBLIC POWER ASSOCIATION

The American Public Power Association is a national service organization representing more than 1,750 municipal and state-owned electric utilities in 49 states. These publicly-owned systems have, since the inception of federal hydro licensing, made a significant contribution to the development of the Nation's hydro potential. Of the 634 Federal Energy Regulatory Commission ("FERC" or "Commission") major licenses issued over the past 63 years, 120 have been granted to public bodies.

Public systems continue to be interested in hydro development. Of the 627 pending applications for licenses or license amendments before the FERC, 90 have been submitted by public systems. Of the 1,258 permits outstanding as of March 31, 1983, 241 were issued to

public systems. Of the 651 preliminary permit applications pending, 106 were filed by public systems.

The hydro resources, both existing and potential, represented by the number of applications and licenses issued, constitute a valuable share of the power supply resources of the public systems. In addition, public systems frequently purchase all or a portion of their power supply from other electric systems that have developed hydroelectric resources. These hydro resources are not only non-polluting, renewable resources, but they also have operational characteristics that enhance their value to electric systems in terms of reliability.

Conflicts between use of land and water for power and other purposes are increasing, and will be a dominating factor in a large number of hydro

licensing and relicensing cases before the Commission. The statutory problem presented in this case has been raised several times in the last decade, and it is crucial that it be resolved with proper regard for Congressional intent and the structure of the Federal Power Act as a whole. The Ninth Circuit's decision, which overturns the FERC's longstanding construction of Section 4(e) of the Federal Power Act, 16 U.S.C. §797(e), permits interference with the relicensing of existing projects, and will distort and delay the future development of hydropower at existing and potential project sites. It will also distort and complicate ongoing procedures for the allocation of scarce water in the Western United States by allowing cabinet Secretaries to control, impede, and misuse FERC proceedings.

The position taken by the Office of the Solicitor General prevents the FERC from presenting to this Court its arguments concerning the harmful consequences of the Ninth Circuit's decision. Because of the effects which this decision will have on the course of subsequent FERC proceedings, the issues involved are not likely to again be presented for judicial review. For these reasons, APPA hereby prays that this Court issue a writ of certiorari and review the decision reached below.

REASONS FOR GRANTING CERTIORARI

- I. THIS DECISION RESOLVES A CONFLICT OF EXTREME IMPORTANCE BETWEEN GOVERNMENTAL AGENCIES IN A FASHION WHICH WILL FRUSTRATE A PRIMARY STATUTORY OBJECTIVE IMPORTANT TO PUBLIC POLICY

This case arose from a disagreement between an independent regulatory agency and an executive department concerning the continued operation of a hydro-

electric project on federal reservation lands. It requires construction of the first proviso of Section 4(e) of the Federal Power Act, 16 U.S.C. §797(e) (1976): 1/

Sec. 4. The Commission is hereby authorized and empowered -

* * *

(e) To issue licenses ... for the purpose of constructing, operating, and maintaining ... project works ... upon any part of the public lands and reservations of the United States ... except as herein provided:

Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem

1/ Prior to 1935, Section 4(e) of the Federal Power Act was Section 4(d) of the Federal Water Power Act of 1920, 49 Stat. 1840-41.

necessary for the adequate protection and utilization of such reservation.

The Court of Appeals for the Ninth Circuit determined, based upon the purported plain meaning of the proviso, that the Commission must insert into any license issued within any Indian reservation all conditions stipulated by the Secretary of the Interior regardless of the Commission's judgment concerning the lawfulness, soundness, or wisdom of the conditions.

The Ninth Circuit's decision permits a cabinet Secretary to wreak havoc on Commission proceedings whenever federal reservation lands or reserved water rights, including groundwater rights, will, in the Secretary's sole judgment, be affected by a project. Most of the remaining sites for economically feasible development of hydroelec-

tricity are located at existing hydro developments or on lands near or within the 517 million acres of public lands withdrawn by the United States and subject to the Court of Appeals' decision. 2/ Of the potential new and incremental hydro capacity identified nationwide, about 75% is located within

2/ See Comptroller General of the United States, Improvements Needed In Review of Public Land Withdrawals -- Land Set Aside For Special Purposes i (1979):

About 517 million acres of our Nation's public lands have been "withdrawn" by Federal agencies. Generally, withdrawals are defined as statutory or administrative actions restricting or segregating public lands from settlement, entry, location, or disposal under some or all of the general land laws. Use of the land thereafter is limited to the specific purpose or purposes for which it was withdrawn.

Of this amount, Section 3(2) of the Federal Power Act excludes national monuments and national parks.

the Pacific Southwest and Pacific Northwest states. 3/

This Court granted a writ of certiorari in Chapman v. Federal Power Commission, 345 U.S. 153 (1953), to resolve a "conflict of view between two agencies of the government" the resolution of which would "affect a substantial number of important sites for the development of hydroelectric power." 4/ This case is equally worthy of certiorari, if not more so, inasmuch as the Ninth Circuit's decision threatens not only to impede the development of new projects but to interfere with the relicensing and continued operation of existing projects. Moreover, the case,

3/ 2 U.S. Army Corps of Engineers, Preliminary Inventory of Hydropower Resources 8-9 (1979).

4/ Chapman, 345 U.S. at 155.

on its facts, involves what this Court has deemed one of the most critical problems in the Southwest United States today, the allocation of scarce water supplies. 5/ The Federal Power Act, properly construed, prescribes an orderly procedure for managing conflicts of the sort presented in this case. The Ninth Circuit's resolution will, as shown below, result in frustration of hydro development which is in the public interest and circumvention of appropriate procedures for the resolution of water rights disputes.

5/ See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 804 (1976).

II. THE NINTH CIRCUIT'S DECISION,
DESPITE THE COURT'S DENIAL, ALLOWS
A SECRETARY TO VETO THE ISSUANCE OF
A LICENSE BY THE COMMISSION,
CONTRARY TO THE ACT AND
CONGRESSIONAL INTENT

A. The Ninth Circuit's Construc-
tion Of The Reservation Proviso
Gives A Secretary Veto Power

The Ninth Circuit stated that it
need not decide if a construction of the
Federal Power Act which would enable
Interior to unconditionally veto a
license would be erroneous, on the
ground that its construction of the
first proviso of Section 4(e) did not
have that effect. Appendix to Petition
for Writ of Certiorari (App.) 24-25, 692
F.2d at 1235. The court reasoned that
"[a]ny license issued by the Commission
which includes conditions propounded by
Interior will be subject to judicial
review." App. 32-33, 701 F.2d at

827. 6/ This is no answer at all to the veto problem, for the effect of the court's decision is to allow the Secretary to assure that no license will be issued. The Commission cannot, consistent with its statutory responsibilities, issue a license containing conditions it believes unlawful, or conditions embodying findings of fact different from its own. The Ninth Circuit, by denying the Commission authority to exclude such conditions, has given the Secretary in question a "backdoor" veto. The facts of this case illustrate the problem clearly.

6/ The court suggested in its initial order, but abandoned in its order on rehearing, the notion that Interior's actions could themselves be challenged in federal district court under the Administrative Procedure Act, 5 U.S.C. §§701-706 (1976). App. 32-33, 701 F.2d at 827.

Section 4(e) of the Act provides that Secretarial conditions are to be contained in FERC licenses. Because, pursuant to Section 6 of the Act, the Commission prescribes all license conditions, Secretarial conditions must be reviewedp by the Commission. Section 6 also directs that all conditions shall be "in conformity with this Act." The Commission found several of Interior's conditions to be inconsistent with the Act 7/ and for that reason excluded them from the license. The Ninth Circuit never criticized the Commission's findings concerning those conditions, and it never discussed the conflict

7/ The Commission so found with respect to Interior's conditions 5 (App. 149 & n.147, 6 F.E.R.C. at pp. 61,415, 61,487 n.147); 8 (App. 151-53 & n.150, 6 F.E.R.C. at pp. 61,415, 61,487 n.150); and 11 (App. 154-55 & n.156, 6 F.E.R.C. at pp. 61,417, 61,487 n.156).

between Section 6 and its interpretation of Section 4(e). It is plain that under Section 6 the Commission could never issue a license containing conditions it determined to be unlawful. 8/

Section 313(b) of the Act provides that the Commission's findings of fact, if supported by substantial evidence, "shall be conclusive." The first proviso of §4(e) requires the Commission to find, as a prerequisite to the issuance of a license within a reservation, that the license will not interfere or be inconsistent with the reservation's purpose. The Commission has long construed the Act to give it the power to override the determination of the concerned Secretary

8/ The Commission cannot simply issue a license and rely on court review of conditions it believes unlawful. The Commission cannot appeal its own orders, so there may well be no judicial review.

on this point. 9/ Several of Interior's conditions would destroy the project favored by Commission on the ground that the Commission was incorrect and that the project favored by the Commission was inconsistent with the reservations' purposes. 10/ The court did not reconcile its construction of §4(e) with

9/ See Pigeon River Lumber Co., 1 F.P.C. 206, 209 (1935) (Commission has "the sole power and duty" to make the required finding).

Acting FPC Chief Counsel James F. Lawson, who had been with the Commission since its first year, testified in 1930 that "The Commission now has power to override the head of a department as to the consistency of a license with the purpose of any reservation."

Investigation of Federal Regulation of Power: Hearings Pursuant to S. Res. 80 and on S. 3619 Before the Senate Comm. on Interstate Commerce, 71st Cong., 2d Sess. 358 (1930) ("Senate Hearings").

10/ Initial Decision, 6 F.E.R.C. ¶63,008 at pp. 65,074-75. ("It is manifest the conditions were designed not to improve the project but to destroy it. The joint brief [of Interior and the Indian Bands] seems to confess as much.")

the Commission's fact finding supremacy, although the dissenting judge on rehearing argued that the conflict dictated rejection of that construction. 11/

B. The Court Below Improperly Dismissed Evidence Of Longstanding Administrative Practice And Congressional Acquiescence Indicating The Absence Of A Secretarial Veto

Longstanding administrative construction of a statute is due great weight, especially when Congressional failure to change the statute during re-enactment indicates acquiescence in the administrative construction. 12/ The history of the Act strongly supports the Commission's authority to overrule Secretarial attempts to thwart its licensing authority. The Ninth

11/ App. 41, 701 F.2d at 831 (Anderson, J., dissenting)

12/ NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974).

Circuit's decision devotes only the briefest attention to historical materials, stating that "the Commission's vigorous historical argument cannot move us to ignore the fact that section 4(e) says, quite simply, that the license 'shall include' [sic] the conditions which the Secretary 'deems necessary.'" App. 23, 692 F.2d at 1234.

In 1930, Congress held hearings leading to the establishment of an independent FPC, during which it inquired into the authority of the Commission vis-a-vis the Departments of Agriculture, War and the Interior, the Secretaries of which then constituted the Commission. Former FPC Executive Secretary O. C. Merrill 13/ and

13/ O.C. Merrill was a principal draftsman of the Federal Water Power Act of 1920, and he testified on behalf of

(footnote continued on following page)

Commissioners Hyde (the Secretary of Agriculture) and Wilbur (the Secretary of the Interior) were all closely questioned on the problem of conflicting authority. 14/ Merrill clearly indicated that the FPC had, and would have if reorganized as an independent commission, the final say on issuance of licenses, even on reservation lands. 15/

(footnote continued from previous page)

the Secretaries of War, Agriculture, and the Interior in hearings preceding its passage. See United States v. Public Utilities Comm'n, 345 U.S. 295, 305 n. 10 (1953); Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395, 418 n.24 (1975). He served as Executive Secretary, the highest ranking full time Commission official, from the FPC's founding until June 30, 1929.

14/ Acting FPC Chief Counsel Lawson's prepared testimony on this issue was cited supra at note 9.

15/ Merrill testified:

In my opinion the best way to maintain the jurisdiction and interests

(footnote continued on following page)

Secretary Hyde testified that the Secretaries would not review licenses issued by an independent commission on reservation lands; he argued, and Secretary Wilbur expressly agreed, that departmental interests would be adequately protected through intervention

(footnote continued from previous page)

of three departments [when an independent commission is established] is to have the field work in so far as it relates to the issuance of licenses, originally handled as it has been ever since I have been with the Federal Power Commission, through the departments, leaving the final say to the Federal Power Commission. But the three departments have no final say in those matters.

Senate Hearings, supra note 9, at 280.

Questioning concerning conflicts between the Commission and the departments continued. Merrill observed:

It came up at times while I was in the commission, and we took the position that the commission's decision was final.

Id. at 281.

in Commission licensing proceedings. 16/

16/ The following exchange, which plainly relates directly to Section 4(e), took place in the House hearings:

Mr. Parks. Mr. Secretary, if this bill should become a law, how would you avoid duplication? For instance, every question of navigation must go back to the Secretary of War. The question of Indian lands or national parks must go back to the Secretary of the Interior. A question with respect to national forests must come back to yourself. Would it relieve you very much of any of the burdens if we should pass this bill?

Secretary Hyde. It would relieve the Secretary, but not the Bureau of Forestry. The Bureau of Forestry, if an independent personnel is set up, and the Bureau of Forestry finds that any of the rights of the public in forest lands were in any wise jeopardized, of course, would have to go on that project in order to make a report of their own which they could present to the commission.

Federal Power Commission: Hearings on
H.R. 11408 Before the House Comm. on
Interstate and Foreign Commerce, 71st
Cong., 2d Sess. 45-46 (1930).

Secretary Wilbur's testimony on the point was even clearer:

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Congress plainly understood the Commission's construction of the reservation proviso in 1930, which was then Agriculture's and Interior's as well. Congress' failure to change section 4(e) in the 1930 legislation, and the Commission's consistent construction of the provision, 17/ weigh heavily against

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I agree with Secretary Hyde that we can well allow these departments to be represented at hearings before the Commission to present phases of departmental interest, rather than to have the control remain in the departments. Otherwise, even though you set up the Commission, you will leave in the hands of the Secretaries, or in the hands of the bureau heads, the power to negate whatever the commission may want to do

Id. at 48.

17/ Pigeon River Lumber Co., supra, 1 F.P.C. 206 (1935); Pacific Gas & Electric Co., 6 F.P.C. 729 (1947)
(Because Secretary of Agriculture and California Fish and Game Division

(footnote continued on following page)

the Court of Appeals' contrary interpretation.

C. The Ninth Circuit's Simplistic
"Plain Meaning" Construction
Will Lead To A Procedural
Morass

The Ninth Circuit's insistence that the Commission has no authority to issue a license without one or more of Interior's conditions is founded solely upon its determination that the phrase "shall be subject to and contain" is inherently mandatory. App. 23-25, 692

(footnote continued from previous page)

proposed divergent conditions for fish protection within national forests, the Commission ruled that it would determine license conditions for that purpose at a later time "after considerations of the respective conditions of the Secretary of Agriculture, the Secretary of Interior, and the State of California," at 730); Pacific Gas & Electric Co., 53 F.P.C. 523 (1975) (Commission rejects Secretary of Agriculture's claim that it must include Agriculture's license conditions proffered to establish the adequate protection and utilization of a national forest).

F.2d at 1234-35. This is too simple a resolution of what the D.C. Circuit termed a difficult question of policy and statutory interpretation. 18/ Ninth Circuit precedent holds that "shall" may sometimes be directory only, depending upon context and legislative intent. 19/

The second proviso of section 4(e) of the Act plainly gives the Chief of

18/ Swinomish Tribal Community v. FERC, 627 F.2d 499, 508 (D.C. Cir. 1980).

19/ United States v. Reeb, 433 F.2d 381, 383 (9th Cir. 1970). See also Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1978); Commissioner v. Brown, 380 U.S. 563, 571 (1965); 2A Sands, Sutherland Statutory Construction §57.02 (1973) ("A not uncommon ambivalence between legislative intent and manifested statutory meaning as the applicable standard of decision appears in the statement [in In Re McQuiston's Adoption, 238 Pa. 304, 86 A. 205 (1913)] that 'whether a statute is mandatory or directory does not depend upon its form, but upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other.'")

Engineers and the Secretary of the Army veto power over licenses affecting the navigable capacity of navigable waters; in such instances those officials must approve an applicant's plans before a license can issue. The first proviso, concerning reservations, contains no correlative language, but the Ninth Circuit, because of "plain meaning," gives Secretaries with jurisdiction over reservations the same power. If this Court does not review the decision below, the problems which this "plain meaning" construction will cause are predictable.

On remand, the Commission, unable to include Interior's conditions, would have no option except to deny the license application. 20/ If appealed,

20/ This result is particularly absurd in the instant case, which involves

(footnote continued on following page)

the reviewing court would then have to evaluate the disagreements between the Commission and the Secretary in the abstract. The court would not have as a reference point a license order in which the Commission accepted, rejected or modified conditions recommended by the Secretary in question and supported its actions based on specific findings of fact that the licensed project, so conditioned, would not interfere or be inconsistent with any occupied reservation. Nor would the court have the benefit of the Commission's evaluation of how best to structure the

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relicensing of an existing project. Presumably the project will be operated indefinitely under nominally interim annual licenses issued pursuant to Section 15(a) of the Act, 16 U.S.C. §808(a), and the additional benefits provided by the Commission in its order will not be forthcoming for the Indians.

project to protect the public interest. 21/ Further, since there would be no positive action to affirm, an appellate decision could only result in a remand to the Commission. An uncooperative Secretary could then simply force yet another stalemate.

The Ninth Circuit contemplated the procedural problems its interpretation of the Act would entail, but in two attempts it did not succeed in finding a resolution. 22/ This Court may never

21/ The Secretary's objections, as in this case, will most likely be more narrowly focused than the public interest considerations required of the Commission.

22/ In its first order, the court presumed that Secretarial action could be reviewed in district court under the Administrative Procedure Act, 5 U.S.C. §§701-706 (1970). App. 24-25, 692 F.2d at 1235. In its second order the court abandoned this presumption, relying on the appellate court's power to review conditions contained in licenses. App.

(footnote continued on next page)

again see a case dealing with this statutory problem which will not be muddled by the awkward procedural posture in which future cases may necessarily be presented. It is imperative, therefore, that this Court address this problem now, in the instant case.

III. THE DECISION BELOW SANCTIONS THE MISUSE OF LICENSING PROCEEDINGS TO ADJUDICATE WATER RIGHTS

At the heart of the dispute between Interior and the FERC was a conflict over the diversion of water from the vicinity of several Indian reservations

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33, 701 F.2d at 827. The latter reliance has two problems. One is that, as demonstrated, in many cases there will be issued no license for which conditions can be reviewed. Another is that a license that contains conditions which only the FERC objects to will never come before a court because the Commission plainly cannot appeal its own orders. Thus, the public interest, as perceived by the agency entrusted with its promotion, would lie undefended and indefensible.

to the vicinity of Escondido. The Commission determined that Escondido had made a satisfactory showing under §9(b) of the Act that it had authority under California law to operate the project, including the diversion of the water. Interior asserted that the Indians had superior water rights pursuant to the Winters doctrine 23/ and urged the Commission to rule accordingly. The Commission refused to allow its proceedings to be used as a forum for suits to try title for property or water rights, 24/ and noted the federal district court litigation of the

23/ Winters v. United States, 207 U.S. 564 (1908).

24/ The Commission has historically resisted such attempts on the ground that it lacks jurisdiction to settle such disputes. See Compliance With State Laws, 2d Ann. Rept. of the FPC 224 (1922); Niagara Falls Power Co., 1 F.P.C. 716 (1938); Seneca Nation of Indians, 6 F.P.C. 1025 (1947).

Escondido-Indian Bands water rights that has been ongoing since 1969. The Commission inserted a condition in the Escondido license allowing for any appropriate modification following the final resolution on the water rights question. 25/

In stark contrast to the Commission's deference to the district court proceeding, Interior's proposed condition 4 26/ would essentially resolve the water rights question in the Indians' favor. The Commission believed that Interior was attempting to circumvent the water rights litigation by seeking through the licensing proceeding to destroy any water rights

25/ App. 107-08, 259, 6 F.E.R.C. at pp. 61,399, 61,463.

26/ App. 148 n.146, 6 F.E.R.C. at pp. 61,486-87 n.146.

that Escondido might have had. 27/ In another licensing proceeding before the Commission at the same time, Interior decided to press a tribal water rights claim before the Commission in lieu of initiating any court litigation. 28/

The Commission resisted what it viewed as abusive practices by Interior in the instant proceeding by rejecting Interior's conditions proposed for Escondido's application. The Ninth Circuit's construction of §4(e) denies the Commission any authority to prevent such misuse of its proceedings.

Interior's role in these proceedings is to advocate the Indians'

27/ Initial Decision, 6 F.E.R.C. at p. 65,073; see also App. 100, 6 F.E.R.C. at pp. 61,396-97.

28/ Southern Cal. Edison Co., 23 F.E.R.C. ¶61,240, pp. 61,512-514 (1983), reh'g denied, 24 F.E.R.C. ¶61,119 (July 22, 1983).

interest and take their side. For this reason, as this Court recently decided, 29/ a tribunal should not be bound by the unadjudicated water rights claims made by Interior on behalf of the Indians it represents. The Ninth Circuit's decision puts Interior, rather than the Commission charged with seeking the broad public interest (consistent with the purpose of any occupied reservation), in control of the issuance of a hydroelectric license. As the record of this proceeding demonstrates, this is contrary to the statute, likely to lead to an abuse of the FERC's orderly process, and constitutes gross error.

The scope of the problem is magnified tremendously by the fact that certain of the water rights at issue in

29/ Arizona v. California, 103 S. Ct. 1382, 1402 n.28, 75 L. Ed. 2d 316, 346 n.28 (1983).

this proceeding are rights to groundwater. The problems involved in applying the Winters doctrine to reserved water rights appurtenant to Indian reservations are monstrous, and the precedents miniscule. 30/ Plainly hydro licensing proceedings are not the place for resolution of reserved groundwater rights disputes. If they were, then the Secretaries of Agriculture and Interior would be in a position, by virtue of the appeals court's ruling, to require nearly every significant hydro project

30/ This Court extended the Winters doctrine to include reservation of groundwater in Cappaert v. United States, 426 U.S. 128 (1976). Cappaert involved an unusually simple factual setting, and the Court acknowledged, but did not resolve, the problems which a more complex set of facts could pose. Id. at 143 n.7. In Cappaert both the level of groundwater reserved and the source of the depletion of the groundwater were well-defined. Neither question will be easily resolved in a case concerning reserved Indian groundwater rights.

in the Western United States to conform to their special interests through the Secretarial authority to insert conditions in proposed FERC licenses. If the disposition of water rights is one of these interests, the possibility of resolving these water rights in an orderly fashion becomes increasingly elusive.

The costs to new hydro power development, to the best use of public lands, and to the federal government in the form of annual charges 31/ can easily become enormously high as multiple fora and rulings become entangled, and result in blocking both the ultimate allocation

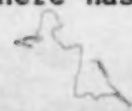
31/ The United States government collects annual charges for the use of tribal and government lands for hydro power purposes, pursuant to Section 17 of the Act. The tribes are credited with their charges; the other charges are earmarked for special uses or go to the state in which the project is located.

of water rights and the prompt development of new hydro potential.

IV. THE COURT'S CONSTRUCTION OF THE PHRASE "WITHIN ANY RESERVATION" IS CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE AND EXTENDS THE SCOPE OF SECRETARIAL POWER SO AS TO JEOPARDIZE THE COMMISSION'S LICENSING AUTHORITY

A. The Court Below Misconstrued The Phrase "Within Any Reservation" To Include Reservation Lands With No Project Works

The Court of Appeals determined that, even though the project works licensed by the Commission were not located on three of the six reservations at issue, the Commission was required to adopt the license conditions which the Secretary deemed necessary to protect the three reservations on which no project works were located because water rights allegedly appurtenant to those reservations might be affected by the project. App. 25-28, 692 F.2d at 1235-37. Because there has never been any adjudicative



decision establishing the water rights associated with the three reservations with no project works, the decision apparently holds that a license is issued "within a reservation" any time a cabinet Secretary asserts that reserved water rights would be affected. As noted, supra, such a holding invites abuses. 32/

The decision below dramatically expands the role of the Secretary of the Interior in the issuance of licenses for hydroelectric projects under Part I of the Federal Power Act because the language of the first proviso of Section 4(e) limits the Secretary's direct participation to cases in which the project works are located "within any reservation" (emphasis added). The

32/ See Arizona v. California, 103 S. Ct. 1382, 1402 n.28, 75 L. Ed. 2d 318, 346 n.28 (1983).

court below refused to accept the normal definition and use of the word "within." Instead, it rejected as "perverse and illogical" the interpretation which would have limited the operation of the first proviso to Section 4(e) to those reservations in which the project works to be licensed were physically located. App. 26-28, 692 F.2d at 1236-37. The Ninth Circuit effectively revised the language "within any reservation" to read "affecting any reservation."

Id. The Ninth Circuit's revision is contrary to the language of and disrupts the balanced regulatory scheme established by both Section 4(e) and the broad public interest criterion of Section 10(a). Both plain meaning in the context of Section 4(e) and the statutory framework argue against the appellate court's interpretation. The court's construction of "within any

reservation" relies on three necessary conclusions, each of which is erroneous: that the term "reservation" as defined in Section 3(2) of the Act includes water rights appurtenant to reservation lands; that the phrase "within any reservation" is ambiguous; and that the first proviso of Section 4(e) was written to protect Indians.

Section 3(2) of the Federal Power Act defines "reservations" to include "tribal lands embraced within Indian reservations" as well as other government "lands and interests in lands." The court concludes that, because water rights are interests in land, they are included in "reservations." App. 25-26, 692 F.2d at 1235-36. However, the Act itself indicates that such a generous construction of "reservation" is unwarranted. "Project" is defined in Section 3(11) to include "all water

rights, ... lands, or interests in lands the use or occupancy of which are necessary or appropriate in the maintenance" of a "unit of improvement or development." "Water rights" are listed separately from "interests in lands," indicating that they are not included in the broader term.

Because of its construction of "reservation," the court found the term "within the reservation" ambiguous. App. 26-27; 692 F.2d at 1236. On the contrary, the statute is clear and could not be made to bear the Ninth Circuit's interpretation without major alteration. Section 4(e) authorizes the Commission to "issue licenses ... for the purpose of constructing, operating and maintaining ... project works ... upon any part of the public lands and reservations of the United States ... Provided, That licenses shall be issued within any

reservation only ..." [emphasis added]. The statutory language can bear the Ninth Circuit's construction only if one accepts the nonsensical proposition that project works 33/ can be owned, operated or maintained upon, and indeed within, water rights. A project may include water rights, but the term "project," as distinguished from "project works," appears nowhere in Section 4(e). The Ninth Circuit sought to introduce ambiguity into §4(e) with its construction of "reservations," but in fact the clarity of §4(e) demonstrates the error of construing "reservations" to include water rights. It is also noteworthy that the second proviso of §4(e) concerns licenses "affecting the navigable capacity of any

33/ Project works are defined in Section 3(12) as "the physical structures of a project."

navigable waters of the United States," and Section 23(b) contains the phrase "if no public lands or reservations are affected." The Act is drafted broadly where breadth is intended, and it is erroneous to read "within any reservation" to mean "affecting any reservation."

Having strained to find the phrase "within any reservation" ambiguous, the court construes it to include water rights because it is in a statutory clause passed for the benefit of dependent Indian tribes. App. 27, 692 F.2d at 1236. The court finds this conclusion "obvious," but it is hardly so. Given the broad definition of "reservations," which includes national forests, military reservations, and "also lands and interests in lands acquired and held for any public purposes," it is difficult to read the

first proviso of §4(e) as other than a provision designed to protect the many facets of the public interest implicated in the Government's various activities. Of the many licensed projects within "reservations", only 15 are on Indian reservations.

B. Contrary To The Ninth Circuit's Ruling, the Commission's Construction Of Section 4(e) Would Not Lead To Absurd Results.

The Ninth Circuit held that it was necessary to reach its construction of 4(e) because of the potential danger of devastating a reservation. Thus, the court felt it necessary to protect the reservations through an expansive reading of the first proviso of Section 4(e). The court ignored the fact that the Commission has the obligation under Section 10(a) of the Act to ensure that the project adopted:

will be best adapted to a comprehensive plan for improving

or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses

This Court has interpreted Sections 4 and 10 of the Act as making the Commission "the guardian of the public domain." Federal Power Commission v. Idaho Power Company, 344 U.S. 17, 23 (1952). In evaluating a project proposal, the Commission would thus be required to consider the adverse impact of a project on any affected reservation. Any failure by the Commission to carry out its duty would be subject to traditional and orderly appeal.

C. The Extension Of The Domain Of Secretarial Veto Power Is Plainly Improper

The strained logic of the Ninth Circuit's construction of "within any reservation" to include "affecting any water rights" is troubling, but the

consequences of that construction, when combined with the Ninth Circuit's "plain meaning" construction of the first proviso, is alarming. The power of a Secretary to block the licensing or relicensing of hydro projects is extended immensely. Projects tens or hundreds of miles from any Indian reservation, national forest, or other reservation may arguably affect water rights, particularly groundwater rights, appurtenant to the reservations. The major project in the Western United States that will not be subject to Secretarial veto under the Ninth Circuit's decision will surely be the exception, rather than the rule. There is nothing in the language or history of the Act to sanction this result.

CONCLUSION

The Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit should be granted.

Respectfully submitted,

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September 21, 1983

SEP 21 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-2056

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO
and VISTA IRRIGATION DISTRICT,
Petitioners,

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA and PALA BANDS
OF MISSION INDIANS and THE SECRETARY OF INTERIOR in his
capacity as trustee for said Bands,
Respondents.

On Petition For Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

**BRIEF OF AMICI CURIAE COLORADO
RIVER WATER CONSERVATION DISTRICT
AND KINGS RIVER CONSERVATION
DISTRICT IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT ..	1
ARGUMENT	3
I. The Ninth Circuit's construction of the Federal Power Act—imposing Secretarial dominion over the Commission—buries the fundamental Congressional purpose to have the Commission decide what constitutes comprehensive development of the Nation's water power resources	3
II. The court below has not only established Secretarial dominion, it has given Secretaries virtually boundless range to exercise that dominion, particularly in the sensitive area of rights to the use of water ..	10
CONCLUSION	15

TABLE OF AUTHORITIES

CASES:	Page
<i>American Textile Manufacturers Institute v. Donovan</i> , 452 U.S. 490 (1981)	4
<i>Apex Hosiery Co. v. Leader</i> , 310 U.S. 469 (1940)	7
<i>Arizona v. California</i> , 373 U.S. 546 (1963)	12
<i>Arizona v. California</i> , 51 U.S.L.W. 4325 (March 30, 1983)	14
<i>Arizona v. San Carlos Apache Tribe</i> , 51 U.S.L.W. 5095 (July 1, 1983)	14
<i>Barr v. Matteo</i> , 355 U.S. 171 (1957)	14
<i>Camp v. Pitts</i> , 411 U.S. 138 (1973)	8
<i>Chemehuevi Tribe v. FPC</i> , 420 U.S. 395 (1975)	3
<i>Clark v. Uebersee Finanz - Korporation</i> , 332 U.S. 480 (1947)	4
<i>First Iowa Hydroelectric Coop. v. FPC</i> , 328 U.S. 152 (1946)	3
<i>FPC v. Idaho Power Co.</i> , 344 U.S. 17 (1952)	8
<i>Nevada v. United States</i> , 51 U.S.L.W. 4975 (June 24, 1983)	14
<i>United States ex rel. Hill v. American Surety Co.</i> , 200 U.S. 197 (1906)	3
<i>United States v. Rutherford</i> , 442 U.S. 544 (1979)	7
<i>Winters v. United States</i> , 207 U.S. 564 (1908)	12
STATUTES:	
Cal. Water Code App. § 59-2 (1968 & Cum. Supp. 1983)	1
Col. Rev. Stat. § 37-46-101 (1973 & Cum. Supp. 1981) .	1
Federal Power Act, 16 U.S.C. § 791a (1976 & Supp V 1981)	<i>passim</i>
National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1976 & Supp. V 1981)	9

Table of Authorities Continued

	Page
LEGISLATIVE HISTORY:	
Hearings Pursuant to S. Res. 80 and on S. 3619 Before the Senate Committee on Interstate Commerce, 71st Cong., 2d Sess. (1930) (Statements of O. C. Merrill and James F. Lawson)	5, 6
Hearings on H.R. 11408 Before the House Committee on Interstate and Foreign Commerce, 71st Cong., 2d Sess. (1930)	6
MISCELLANEOUS:	
National Hydroelectric Power Resources Study, Vols. XII and XXII (Sept. 1981)	10, 11

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**BRIEF OF AMICI CURIAE COLORADO
RIVER WATER CONSERVATION DISTRICT
AND KINGS RIVER CONSERVATION
DISTRICT IN SUPPORT OF PETITIONERS**

**STATEMENT OF INTEREST AND SUMMARY OF
ARGUMENT**

Your *amici*, the Colorado River Water Conservation District (CRWCD) of Colorado and the Kings River Conservation District (KRCDD) of California are both political subdivisions of their respective states¹ and are both

¹ See Col. Rev. Stat. § 37-46-101 (1973 & Cum. Supp. 1981); and Cal. Water Code App. § 59-2 (1968 & Cum. Supp. 1983). This brief, therefore, falls within Rule 36.4 of this Court's Rules.

actively engaged in the development of hydroelectric projects as existing or potential licensees under the Federal Power Act (the "Act").² 16 U.S.C § 791a (1976 & Supp V 1981). These *amici* join in urging this Court to review the decision of the Ninth Circuit whose construction of the Act (1) dramatically reverses the underlying Congressional policy of encouraging hydroelectric power development by eliminating the primary jurisdiction of the Federal Energy Regulatory Commission ("FERC") to decide the conditions under which a project should be licensed; (2) does so in a context applicable to virtually all major hydroelectric projects in the western United States; and (3) invents a novel construction of implied reserved water rights for Indians as "reservations" under the Act, with possibly far reaching and dangerous effects in the sensitive water rights area. From the standpoint of power developers in the western states where federal lands are highly concentrated, that decision not only threatens to devastate future developmental efforts but creates substantial uncertainty with respect to the operation of existing projects and to the water rights that support them.

We make this submittal particularly mindful of the unusual circumstance that finds FERC, as the agent of Congress for the administration of the Act, barred from speaking on its own behalf and in defense of its proper construction of the Act.

²CRWCD has a license application pending before the Federal Energy Regulatory Commission in project number P. 2757, holds preliminary permits in P. 6644 and P. 5866, and has an application for a preliminary permit pending in P. 2779. KRCD holds licenses in P. 2890 and P. 2741.

ARGUMENT

I. The Ninth Circuit's construction of the Federal Power Act—imposing Secretarial dominion over the Commission—buries the fundamental Congressional purpose to have the Commission decide what constitutes comprehensive development of the Nation's waterpower resources

The Ninth Circuit panel majority holds that FERC, the agency responsible for project licensings under the Act, is bound under the plain terms of section 4(e) of the Act, 16 U.S.C. § 797(e), to accept any conditions to those licenses propounded by the department supervising any "reservation" allegedly affected by the project. Pet. App. 24. That ruling effectively grants reservation supervisors (here the Department of the Interior) a licensing veto since their unilaterally imposed conditions can render a project infeasible.

The majority's myopic reliance on the "plain meaning" canon has caused it to overlook the object of its effort—to ascertain the statute's purpose. *See, e.g., United States ex rel. Hill v. American Surety Co.*, 200 U.S. 197, 203 (1906) ("Statutes are not to be so literally construed as to defeat the purpose of the legislature"); *and see Chemehuevi Tribe v. FPC*, 420 U.S. 395 (1975) (where this Court considered the purpose of the Act in construing section 4(e)). The undisputed purpose of the Act is to encourage the development of the Nation's water power resources. *First Iowa Hydroelectric Coop. v. FPC*, 328 U.S. 152, 171, 180 (1946); *Chemehuevi Tribe v. FPC*, 420 U.S. at 404. *See* Brief in Opposition of Respondents La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians (Bands Br.) at 8. Yet the panel holds that where judgments must be made with respect to reservations reconciling FERC's concern for the development of power against competing concerns raised by any of a

variety of departments, power development must always yield. This startling result turns the statute against itself. Congress surely did not spend almost a decade agonizing over water power development legislation that, by its own terms, would place collateral concerns over and above a power development deemed by FERC to be best adapted to comprehensive development of the water resources. Section 10(a) of the Act, 16 U.S.C. § 803(a).³

If the responsibility of FERC to determine the project best adapted to comprehensive development was truly to be subservient to the parochial concerns of all those other agencies, one would certainly expect to see some discussion to that effect in the Power Act's legislative history. Instead the legislative history, to which the majority below had access, is compellingly to the contrary.⁴ It

³ Nor does the majority's "literal" reading square with other language of the Act. Section 6, 16 U.S.C. § 799, allows that licenses "may be altered . . . upon the mutual agreement of the licensee and the Commission" It says nothing about the concurrence of the various other government departments. Thus under the majority's view, FERC and the licensee are bound to accept departmental conditions which, under section 6, they might later amend without departmental approval. Congress cannot be presumed to have written departmental vetoes into the Act in one place only to negate them elsewhere in that Act. See *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 513 (1981) ("we should not 'impute to Congress a purpose to paralyze with one hand what it sought to promote with the other,'" quoting *Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480, 489 (1947)). And see Pet. App. at 154-55, where FERC rejected as unlawful Interior's effort to condition the license in this case so that the project could not be altered without Interior's approval.

⁴ The majority ignores compelling legislative history to reach the sweeping conclusion that the Commission must accept Interior's conditions, yet relies heavily upon legislative history to support its equally sweeping holding on MIRA. Pet. App. 34.

pounds home the Congressional understanding that the Commission was expected to act independently on all questions, whether reservations were involved or not, save only for the approval of drawings for dams and other facilities affecting navigation by the Army's Chief of Engineers. This was true both when the Commission was composed of three Secretaries (War, Agriculture and Interior) from 1920-1930, and as the five-person independent Commission it has been ever since the Act was amended in 1930.

In the hearings underlying the 1930 amendments, when it was clear the three Secretaries were individually too busy to get the job done as a Commission, O.C. Merrill, as Commission Secretary and a major architect of the 1920 Federal Water Power Act, stated:

[T]he three individual departments have what is called collateral jurisdiction. The Department of Agriculture has jurisdiction over the national forests. The Department of the Interior has jurisdiction over the public lands, reclamation, withdrawals, and so forth. The War Department has jurisdiction over the navigable waters. In my opinion the best way to maintain the jurisdiction and interests of the three departments is to have the field work in so far as it relates to the issuance of licenses, originally handled as it has been ever since I have been with the Federal Power Commission, through the departments, *leaving the final decision to the Federal Power Commission. But the three departments have no final say in those matters.*

Hearings Pursuant to S. Res. 80 and on S. 3619 Before the Senate Committee on Interstate Commerce, 71st Cong., 2d Sess. 280-81 (1930) (emphasis added). Merrill continued (*Id.*, emphasis added):

The Agricultural Department in such cases is cooperating with this new commission, and its officers are making reports upon certain projects, with

recommendations to the Federal Power Commission. But there is where the responsibility ends. *The decision rests with the Federal Power Commission.*

Finally, in response to the suggestion that differences might also arise between the Commission and the War Department, Merrill added (*Id.*, emphasis added):

The same thing is bound to come up at times. It came up while I was in the commission, and *we took the position that the commission's decision was final.* We do not always agree with the War Department, but ordinarily we did.

The Commission lawyer at the time was equally clear that the Commission, not some department, was to decide (*Id.*, at 358):

The commission now has power to overrule the head of the department as to the consistency of a license with the purpose of any reservation.

So was the then Secretary of the Interior, Wilbur:

I agree with Secretary [of Agriculture] Hyde that we can well allow these departments to be represented at hearings before the commission to present phases of departmental interests, rather than to have the control remain in the departments. Otherwise, even though you set up the commission, you will leave in the hands of the Secretaries, or in the hands of the bureau heads, the power to negate whatever the commission may want to do, that is, to ask the consent of the department involved.

I cannot conceive of this Federal Power Commission really being effective unless it controls all power sites where it grants licenses, for if you have to ask the permission of this department or that department, there will be difficulties that will be absolutely impossible to overcome.

Hearings on H.R. 11408 Before the House Committee on Interstate and Foreign Commerce, 71st Cong., 2d Sess. 47-49 (1930).

In these circumstances there was no requirement for Congressional alteration of language that already had a well understood "plain meaning." See *United States v. Rutherford*, 442 U.S. 544, 554 n. 10 (1979) ("once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned", quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 487-489 (1940)). And the Commission operated under the language with precisely that understanding for over 60 years.

To hold otherwise, as has the panel majority below, wipes out all of that history and effectively deprives the Commission of the means to implement the duty placed upon it by Congress under section 10(a) to see that in the licensing of projects:

[T]he project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes

16 U.S.C. § 803(a).

We do not suggest that FERC is to ignore reasonable stipulations that may be proposed by the various departments. We do submit, however, that FERC was intended to be the ultimate arbiter of the *overall* public interest, including the assessment of all proposed departmental stipulations. The Ninth Circuit's result, on the other hand, puts a licensing veto in the hands of a number of departments, with no real ultimate authority assessed to

any of them. Judge Anderson recognized this in his dissent. Pet. App. 39-41.

It is no answer to suggest, as the majority does, that judicial review would cure any "unconditional veto power" otherwise granted to the departments. Pet. App. 24-25. To begin with, the panel had to retreat on rehearing from the utilization of judicial review under the Administrative Procedure Act as one control on Interior. Pet. App. 32-33. More importantly, however, section 313(b) of the Power Act, 16 U.S.C. § 825l(b), makes it clear that FERC is to make the threshold findings of fact, which are thereafter reviewed for sufficiency by the courts of appeals. It is not for the courts of appeals to assess *de novo* the reasonableness of proposed license conditions. See *FPC v. Idaho Power Co.*, 344 U.S. 17, 21 (1952); and *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (under a similar statutory scheme this Court explained that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). Moreover, we fail to see how there can be meaningful judicial review at all when FERC is forced to *deny* a license on the strength of a departmental recommendation. In that circumstance FERC would simply contend to the reviewing court that it was bound to accept the departmental recommendation, and, as apparently recognized by the majority on rehearing (Pet. App. 32-33), the department's action would not be subject to independent judicial review. There is thus a total lack of administrative as well as judicial due process; the applicant who is denied a license appears to have no recourse.⁵

⁵ This is of no mere academic concern. For example, in Project No. 2757 (see note 2 *supra*), Interior made clear to the Commission its substantial interest in endangered fish studies, wild and scenic river

It is similar'y mere semantics to advise, as the majority below does, that if the Commission does not like the conditions which some Secretary may hand it, it simply need not issue the license. This would be defeating the Congressional purpose to further water power development by just another route. It is for this reason as well that this jurisdictional impasse is presently ripe for this Court's review. The command of the majority below is plain—"the Commission must accept Interior's conditions". Pet. App. 23. A remand would be only a charade, leaving the Commission meanwhile facing an impossible burden of administration of the Act with its jurisdiction gutted and its existing licensees and current applicants fair game for special pleaders at any agency having a reservation interest to urge.

The licensing of a major hydroelectric project has never been a simple undertaking. It has, however, become more and more complex, to the point that under the National Environmental Policy Act alone, an application for a license has become a very substantial and expensive enterprise. The studies for and preparation of such an application, and seeing it through the procedural steps of scoping, environmental impact statement preparation, hearing, initial decision by an Administrative Law Judge, final decision by the Commission, rehearing and judicial review, involves millions of dollars. Applicants should not be remitted to this process unless they have a Commis-

studies and other concerns such that it doubted even the desirability of issuing a preliminary study permit, indicating there was every likelihood it would oppose construction. FERC granted the permit subject to studying Interior's concerns, and accepted an application for a license, now pending. If in similar circumstances Interior then opposes a license in asserted aid of a reservation, and if FERC must acquiesce in Interior's recommendation, what remedy would be available to the applicant?

sion with the ultimate authority to decide whether the project should be licensed under section 10(a). The disarray which the opinion below creates effectively discourages further development of a clean, renewable source of energy and should not be suffered without further examination by this Court.

The recent inventory of the hydroelectric potential of this country directed by Congress to be made by the Corps of Engineers shows that an enormous undeveloped resource remains, with 64,000 MW of hydro in being and 354,000 MW remaining. *National Hydroelectric Power Resources Study*, Vol XII at 4-16 (Sept. 1981). There are enough hedgerows in the way of realizing even a fair portion of this potential (including the Wild and Scenic Rivers Act, the Wilderness Act and the Endangered Species Act) without, in addition, converting the Commission with the responsibility for licensing such development into a paper shuffling rubber stamp designed as a conduit for Secretarial vetoes. While this impediment to development is of nationwide importance, it is clearly an urgent problem in the West where the impoundment of water to satisfy growing consumptive uses is a continuing need. The development of hydroelectric power at such sites to assist in repaying storage costs, let alone the plain common sense of utilizing the falling water as a resource for power, should have available the ultimate decision-making forum which Congress provided.

- II. The court below has not only established Secretarial dominion, it has given Secretaries virtually boundless range to exercise that dominion, particularly in the sensitive area of rights to the use of water

The decision below is not only wrong, it is exceedingly far-reaching. The decision applies to all licenses within or possibly affecting "reservations", a term broadly defined

in the Act to include federal land reserved from private appropriation and "held for any public purpose." 16 U.S.C. § 796(2).⁶ Hundreds of existing federally licensed projects utilize federal lands and reservations;⁷ and of the potential new hydroelectric capacity, the great majority is located in the western United States where federal reservations are also concentrated. See *National Hydroelectric Power Resources Study*, Vol. XXII at 1-2 (Sept. 1981).⁸

Beyond that, the Ninth Circuit now holds that water rights downstream of and outside the project boundary are "reservations." Pet. App. 25-28. The court reached this view, notwithstanding the fact that section 4(e) of the statute is expressly applicable only to licenses "within"

⁶ Under the Act,

"reservations" means national forest, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks.

It may be noted that this full text, with its wide-open penultimate clause, was not included in the opinion below. Pet. App. 25.

⁷ FERC's counsel indicated at the oral argument below that over 600 federal projects utilize federal lands and reservations.

⁸ The Bands concede that, as regards the question of Secretarial dominion over FERC, the decision below might "have a broad[] impact," but suggest that "there is no reason to expect [inter-agency] conflicts to increase in the future." Bands Br. 24-25. To the contrary, initial license and relicense applications before FERC have dramatically increased in recent years, and areas of potential inter-agency conflict have exploded with the recent advent of the environmental statutes mentioned earlier (p. 10). The result, evident in this case, is that increased Secretarial participation and inter-agency conflict can be expected in FERC licensing proceedings, particularly if this case is permitted to stand.

reservations, on the ground that the implied reservation of water rights under *Winters v. United States*, 207 U.S. 564 (1908), constitutes "a reservation" within the meaning of the Act.

Winters does establish that rights to the use of water were impliedly reserved by the United States at the time of the establishment of an Indian reservation. The existence of such rights, however, which are of course subject to measurement and proof, as in *Arizona v. California*, 373 U.S. 546, 596-97 (1963), does not automatically convert such rights into a "reservation" within the meaning of section 3(2) of the Act. This magic leap was made below in order to find that the project involved was within all six of the reservations, it being clear on the facts that the project boundaries lay only partially within the geographic boundaries of three of the six reservations. Since the water rights of the other three reservations might be affected by the project, situated as they are below the project in the San Luis Rey River watershed, the court elected to find that the water rights were reservations within the meaning of the Power Act and thus subject to such conditions as the Secretarial proprietor of the reservations might deem necessary. There was no requirement, nor is there justification, for this strained and novel interpretation.

The question of the right to the use of waters among the parties involved is already in litigation in a United States District Court having jurisdiction over the controversy. FERC has historically abstained from making any determinations with respect to water rights. Pet. App. 99. Recognizing that it has no jurisdiction to declare rights in this very important and sensitive area, FERC included within the license for the Escondido project a condition which would permit it to modify the license as

appropriate to recognize the disposition of the water rights litigation. Pet. App. 259. There was accordingly no need to strain for the interpretation made by the court.

If Indian water rights are a reservation within the meaning of the Act, simply because they are appurtenant to a reservation specifically provided for in the statutory definition, then any other water rights falling within the implied reservation doctrine may well be argued as entitled to the same treatment. And, according to the court below, such "reservation" need not be "within the reservation" as is required by the language of section 4(e). Putting to one side the fact that the very language of the first proviso of section 4(e) as to reservations obviously does not embrace water rights, existing licensees, pending license applicants and those preparing applications are faced with the possibility of having the operations of their projects further hobbled by such conditions with respect to releases of water as whatever Secretary may be involved feels necessary in order to accommodate an alleged reserved right. This might, for example, be asserted on behalf of a wilderness study area, a wild or scenic river study section, a fish and wildlife refuge or whatever other "reservation" might be asserted to exist, and presumably, however far downstream it might be from the project involved. Again there would be the spectacle of FERC being placed in the position of requiring a licensee to deliver quantities of water to meet Secretarial conditions, the rights to which could very well be in dispute and which had never been adjudicated. Indeed, Secretarial claims might well have been denied in State water adjudication proceedings, and nevertheless be binding on FERC if pushed in that forum.

Courts should be circumspect about declaring interpretations that are unnecessary for the purposes of a particular case and that can only bring mischief in their further application. *Barr v. Matteo*, 355 U.S. 171, 172 (1957). This is particularly true in the delicate area of water rights, which have always been of critical importance in the West and which are becoming increasingly significant throughout the Nation. The court below, in fashioning a construction to assist the Indian reservations downstream unfortunately overlooked the fact that reservations are legion, and under the court's broad language may be argued as even more universal. While there of course must be concern for possible Indian entitlements, this must not be to the exclusion of all other rights and obligations which might be involved. The holdings of this Court during the past term in *Arizona v. California*, 51 U.S.L.W. 4325 (March 30, 1983), *Nevada v. United States*, 51 U.S.L.W. 4975 (June 24, 1983), and *Arizona v. San Carlos Apache Tribe* (the McCarran Act cases), 51 U.S.L.W. 5095 (July 1, 1983), gave recognition to the protection of such rights in the context of the water rights of all who might be involved. Here it is not only straining unnecessarily to include implied reserved rights within the technical meaning of "reservation" under the Federal Power Act, but it exposes numerous existing licensees as well as pending license applicants to an incredible unknown obligation against their projects which is totally unwarranted.

We, of course, do not agree with the Ninth Circuit's broad expansion of "reservations"; but if it is allowed to stand, the scope of departmental vetoes could expand exponentially to apply to any license affecting federal lands—virtually all major projects in the western United States. On that basis alone this Court's review is warranted.

CONCLUSION

The Court should review this case to resolve the intra-governmental jurisdictional clash under the Federal Power Act which goes to the heart of that Act's purpose to provide for the comprehensive development of the Nation's hydroelectric power resources. The Ninth Circuit would resolve that clash by denuding the Act's administrator and demoting power developmental concerns to the concerns of reservation supervisors. That decision is not only at odds with the Act, it is of unnecessarily far reaching implication, as it overstrains the *Winters* doctrine of implied water reservations in order to expand the reservation supervisors' sphere of influence under the Act.

Since resolution of this jurisdictional dispute is fundamental to the continued proper administration of the Act and in view of the strong Congressional concern for the proper development of the Nation's water power resources reflected in that Act, this Court should grant the petition for a writ of certiorari.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO
and VISTA IRRIGATION DISTRICT,

v. *Petitioners,*

LA JOLLA, RINCON, SAN PASQUAL, PAUMA and
PALA BANDS OF MISSION INDIANS,
and THE SECRETARY OF INTERIOR in his capacity
as trustee for said Bands,

Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE
JOINT BOARD OF CONTROL OF THE FLATHEAD,
MISSION AND JOCKO VALLEY IRRIGATION
DISTRICTS OF THE FLATHEAD IRRIGATION
PROJECT, MONTANA, IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF THE JOINT BOARD OF CONTROL.....	1
ARGUMENT	7
CONCLUSION	15

H

TABLE OF AUTHORITIES

<i>Cases:</i>	<i>Page</i>
Chapman v. Federal Power Comm'n, 345 U.S. 153 (1953)	7-9, 13
Confederated Salish & Kootenai Tribes v. United States, 199 Ct. Cl. 599, 467 F.2d 1315 (1972)....	2
Escondido Mutual Water Co. v. Federal Energy Regulatory Comm'n, 701 F.2d 826 (9th Cir. 1983), <i>denying reh'g</i> to 692 F.2d 1223 (9th Cir. 1982)	11-14
Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955)	7, 8
Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960)	10-12
First Iowa Hydroelectric Cooperative v. Federal Power Comm'n, 328 U.S. 152 (1946)	7
Lac Courte Oreilles Band v. Federal Power Comm'n, 166 U.S. App. D.C. 245, 510 F.2d 198 (1975)	9, 10
Montana Power Company, 23 F.E.R.C. ¶ 61,464 (June 30, 1983)	3, 4
Montana Power Company v. Federal Power Comm'n, 148 U.S. App. D.C. 74, 459 F.2d 863, <i>cert. denied</i> , 408 U.S. 930 (1972)	14
Nevada v. United States, 51 U.S.L.W. 4974 (U.S. June 24, 1983)	4
Northern States Power Company, 50 F.P.C. 753 (1973), <i>aff'd sub nom. Lac Courte Oreilles Band v. Federal Power Comm'n</i> , 166 U.S. App. D.C. 245, 510 F.2d 198 (1975)	9, 10
Winters v. United States, 207 U.S. 564 (1908)	10
 <i>Constitutional Provisions:</i>	
U.S. Const., Art. IV, § 3, cl. 2 (Property Clause)....	7, 10
 <i>Statutes:</i>	
Act of January 12, 1891, 26 Stat. 712 (Mission Indian Relief Act)	5, 10-12
Act of May 29, 1908, 35 Stat. 444, 448-50	4

TABLE OF AUTHORITIES—Continued

	Page
Act of June 10, 1920, 41 Stat. 1063, as amended,	
16 U.S.C. §§ 791a <i>et seq.</i> (Federal Power Act) .. <i>passim</i>	
Section 3(2), 16 U.S.C. § 796(2)	9, 11
Section 4(e), 16 U.S.C. § 797(e)	5, 8-14
Section 10(a), 16 U.S.C. § 803(a)	13
Section 10(e), 16 U.S.C. § 803(e)	5, 9-12, 14
Section 15(a), 16 U.S.C. § 808(a)	4, 5
Section 21, 16 U.S.C. § 814	12
Section 29, 16 U.S.C. § 823	10
Act of May 10, 1926, 44 Stat. 453, 465	2
Act of March 7, 1928, 45 Stat. 200, 212-13	2
Act of June 18, 1934, 48 Stat. 987, 25 U.S.C.	
§ 476 (Indian Reorganization Act)	5, 11, 12
Act of May 25, 1948, 62 Stat. 269	3
Montana Code Ann. §§ 85-7-1601 <i>et seq.</i> (1981)....	1

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-2056

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO
and VISTA IRRIGATION DISTRICT,
Petitioners,
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and THE SECRETARY OF INTERIOR in his capacity
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Respondents.

On Petition for Writ of Certiorari to the United States
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JOINT BOARD OF CONTROL OF THE FLATHEAD,
MISSION AND JOCKO VALLEY IRRIGATION
DISTRICTS OF THE FLATHEAD IRRIGATION
PROJECT, MONTANA, IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST OF
THE JOINT BOARD OF CONTROL

The Joint Board of Control of the Flathead, Mission,
and Jocko Valley Irrigation Districts was organized in
1980 by its three constituent Montana irrigation districts
("the Districts"), pursuant to Sections 85-7-1601 *et seq.*
of the Montana Code Annotated, to act as operating agent

for the Districts. The Districts include the Indian and non-Indian owners of all lands (other than Indian trust lands) irrigated by the Flathead Irrigation Project ("Irrigation Project") of the Flathead Indian Reservation, Montana ("Reservation").¹

The Districts were incorporated under Montana law in 1926, in response to the Act of May 10, 1926, 44 Stat. 453, 465, whereby Congress expressly conditioned continued construction of an Irrigation Project power generating facility at the site of the present Kerr Hydroelectric Development of the Montana Power Company (as well as availability of additional federal funds for any Project construction) upon formation of Montana irrigation districts embracing lands irrigable by the Irrigation Project, and execution by such districts of contracts with the United States assuring repayment of reimbursable construction and other Irrigation Project costs to the United States, upon security of a first lien on district lands. The 1926 legislation provided that revenues from the sale of power then in process of development by the Irrigation Project at the Kerr site would be used, first to repay costs of the power development, and then to repay other reimbursable Irrigation Project construction and other costs.

Before execution by the Districts of repayment contracts as contemplated by the 1926 legislation, Congress, by the Act of March 7, 1928, 45 Stat. 200, 212-13, authorized the Federal Power Commission to license the reserved or appropriated power rights of the Irrigation Project then being developed by the Irrigation Project at the Kerr site, to a private company or companies for

¹ For a survey of the history of the Reservation, the Irrigation Project, and the Districts, see *Confederated Salish & Kootenai Tribes v. United States*, 199 Ct. Cl. 599, 467 F.2d 1315 (1972).

more extensive development, in exchange for benefits for the Irrigation Project satisfactory to the Secretary of the Interior as compensation for the taking of the Irrigation Project's power development rights. The 1928 legislation also provided that a reasonable annual rental should be paid to the Confederated Salish and Kootenai Tribes ("the Reservation Tribes"), for use of tribal lands that would be involved.

In 1930 the Federal Power Commission in fact issued a license (License No. 5) to the Rocky Mountain Power Company, Montana Power Company's predecessor, to develop a large generation facility at the present Kerr hydroelectric site. Consistent with the enabling legislation and at the behest of the Secretary of the Interior, the Commission, by Article 26 of License No. 5, granted certain blocks of low cost electric energy to the Irrigation Project for use for pumping and resale to power customers within the Reservation, as compensation for use by the licensee of the Irrigation Project's prior rights to the Kerr site. See *Montana Power Company* (Project No. 5-003), 23 F.E.R.C. ¶ 61,464 (issued June 30, 1983). The Commission also granted an annual rental to the Tribes for the use of tribal lands.

Pursuant to the Act of May 25, 1948, 62 Stat. 269, revenues from Irrigation Project resale of the low cost energy furnished to the Irrigation Project pursuant to Article 26 of License No. 5 must be employed for reimbursement, first, of Project power distribution system construction costs; then for reimbursement of other Project construction costs including irrigation construction costs; and finally for other Irrigation Project purposes.

The owners of lands irrigated by the Irrigation Project are, as such, the beneficial owners of the Irrigation Project, and of its associated water and power rights, including the right to continue to receive low cost power

from the licensee of the Kerr Development for pumping and for resale to power customers on the Reservation. See *Nevada v. United States*, 51 U.S.L.W. 4974, 4977-79 (U.S. June 24, 1983). In addition, pursuant to the Act of May 29, 1908, 35 Stat. 444, 448-50, these landowners will by law ultimately succeed to the management and operation of the Irrigation Project. Accordingly, the Joint Board, as the representative of these landowners, speaks for the beneficial owners and future managers and operators of the Irrigation Project and its associated water and power rights, including the right to continue to receive low cost energy from the present and any future licensee or operator of the Kerr Hydroelectric Development. As such, the Joint Board has a great interest in protecting the Irrigation Project's water and power rights, and in assuring the development of available resources needed to meet increasing demand for water and power on the Reservation.

With a view to protecting the Irrigation Project's and the landowners' interest in the continued availability of low cost power from the licensee of the Kerr Hydroelectric Development, as compensation for use of the Irrigation Project's prior reserved or appropriated development rights, the Joint Board has been granted intervention in FERC proceedings now in process pursuant to Section 15(a) of the Federal Power Act, 16 U.S.C. § 808 (a), looking toward the relicensing of the Kerr Hydroelectric Development. See *Montana Power Company* (Project No. 5-003), 23 F.E.R.C. ¶ 61,464 (issued June 30, 1983), *supra*.²

In addition, in order to assure development of needed supplemental supplies of power at other potential hydro-

² The original 50-year license for the Kerr Development (License No. 5) expired on May 22, 1980. The Montana Power Company and the Reservation Tribes have filed competing applications for a new license for the Development, and it is anticipated that these applications will be set for hearing in the near future. In the interim, the expired license is, in effect, renewed annually.

electric sites within the Irrigation Project's service area, the Joint Board has filed applications with FERC seeking preliminary permits for low-head hydropower developments at various sites on the Reservation.³ The Reservation Tribes have intervened in each of these preliminary permit proceedings before FERC. Invoking the very statutes at issue in the instant case—Sections 4(e) and 10(e) of the Federal Power Act, and Section 16 of the Indian Reorganization Act—the Tribes have there asserted that preliminary permits cannot be granted to the Joint Board, or to anyone else, without Tribal consent, and that such consent will not be given.

In the instant case, the majority of the Ninth Circuit panel apparently has held that FERC's authority to license and relicense hydropower projects, pursuant to Sections 4(e) and 15(a) of the Federal Power Act, is not inconsistent with an independent and unreviewable veto power of Indian tribes with respect to use of their reservations in any such projects. In consequence, the majority of the panel concluded that a previously enacted provision of the Mission Indian Relief Act, Act of January 12, 1891, 26 Stat. 712 ("MIRA"), which it interpreted as conferring such a power on the Mission Indians, was not repealed by the enactment of Section 4(e). Judge Anderson, in his concurring and dissenting opinion below, points out that Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476 (1934) ("IRA"), contains a sweeping provision authorizing tribes organized pursuant thereto to prevent sale, disposition, lease, or encumbrance of their lands without tribal consent. Hence, unless the Ninth Circuit panel's decision herein is reversed, it will be arguable that any organized tribe whose lands may now or hereafter be involved in any FERC hydropower

³ Lower Crow Creek Project (Project No. 5208-001); Mission Dam Power Project (Project No. 5653-000); Post Creek Power Project (Project No. 5655-000); and Dry Creek Power Project (Project No. 5656-000). See 46 Fed. Reg. 61706-08 (December 18, 1981); *id.* 62497-98 (December 24, 1981).

project holds an absolute and unreviewable veto power over continued operation, licensing, or relicensing thereof. Of particular interest to the Joint Board, unless the erroneous decision below is reversed, FERC may feel constrained by the majority holding below to conclude that, regardless of the public interest, it has no alternative other than to deny the Joint Board's low head hydropower applications because of the veto interposed by the Reservation Tribes, which are organized pursuant to IRA. Furthermore, FERC might also feel constrained, again regardless of public interest considerations, either to award the license for the Kerr Development to the Reservation Tribes or to permit the great power resource represented by the Kerr Development to be lost to the country if the Reservation Tribes should decide, for whatever reason, to interpose a veto.

As pointed out in the Petition for Writ of Certiorari at 14, the same situation no doubt exists at many other actual and potential hydropower sites in the West, wherever lands or reserved waters of an organized tribe may be involved.

The Joint Board has manifested its interest in correcting the Ninth Circuit panel majority's error by preparing and tendering to the panel its Brief Amicus Curiae in Support of Petitions for Rehearing or Rehearing En Banc, together with an appropriate motion seeking leave to file the same. Although no party to the case opposed receipt of the amicus brief thus tendered, the panel, by the same divided vote later recorded on rehearing, denied the Joint Board's motion and, by Order filed February 22, 1983, refused to accept the amicus brief. Circuit Judge Anderson, whose concurring and dissenting opinion on rehearing reflects that he was persuaded by the analysis set forth in the amicus brief, dissented and would have received it.

The filing of the instant amicus curiae brief in this Court has been consented to in writing by all parties to No. 82-2056.

ARGUMENT

The decision below is fundamentally inconsistent with the paramount role that Congress, pursuant to the Property Clause (Art. IV, § 3, cl. 2) of the Constitution, has assigned to FERC and its predecessor, the Federal Power Commission, in fashioning national policy with respect to hydroelectric power development on "reservations of the United States." This Court's decisions have consistently recognized the primacy of FERC's role as "the permanent disinterested expert agency of Congress" to fashion and effectuate a cohesive national hydropower policy, *Chapman v. Federal Power Comm'n*, 345 U.S. 153, 168 (1953). Moreover, this Court has firmly rebuffed similar attempted encroachments on FERC's authority. Thus, faithful to the Federal Power Act's overriding purpose to ensure "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation," *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152, 180 (1946), this Court has rejected attempts by state governments, in the purported exercise of their own sovereign powers, to foreclose FERC from exercising the judgment and discretion which Congress has entrusted to it. Such attempts to intrude upon FERC's authority, this Court has warned, would result in a scheme of "divided authority" which "easily could destroy the effectiveness of the Federal Act." *Id.* at 164, 174. *Accord*, *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 445 (1955).

The Court of Appeals' holding that tribal consent is a condition precedent to the exercise of FERC's congressionally delegated authority to license hydropower sites is directly at odds with the purpose of the Federal Power Act as authoritatively construed by this Court. The seriously divided panel's decision on the issue of tribal consent stands not merely for the proposition that FERC must share its congressionally delegated licensing power with Indian tribes when a portion of a hydropower proj-

ect happens to be located upon tribal lands embraced within Indian reservations. The Court of Appeals has in effect held that Congress intended, in enacting Section 4(e) of the Federal Power Act, to empower an Indian tribe to abrogate and displace the otherwise comprehensive authority of the Commission by the peremptory exercise of a tribal veto which would be unreviewable either by the Commission or by any court of the United States on judicial review.

The decision below would therefore permit individual Indian tribes to set national hydropower policy in a disjointed, patchwork fashion lacking the cohesiveness which Congress wished to ensure when it passed the Federal Power Act. The holding of the Ninth Circuit represents a marked departure from the Act's fundamental premise that FERC acts on behalf of *all* citizens of the United States—including Indians—in setting national hydropower policy and "seeing to it that the interests of all concerned are adequately protected." *Federal Power Comm'n v. Oregon*, *supra* at 449. Indeed, the Ninth Circuit's treatment of the issue of tribal consent reintroduces the fragmented, piecemeal approach to the establishment of hydropower policy that prevailed prior to the enactment of the Federal Water Power Act by hinging water power development on the insular interests of individual tribes and attendant political considerations. *Cf. Chapman v. Federal Power Comm'n*, *supra* at 167 ("local pressures and logrolling" resulting from *ad hoc* congressional action prior to passage of Federal Water Power Act). This Court should grant certiorari and reverse the judgment of the Court of Appeals to vindicate the authority of the Commission as conceived by Congress and to harmonize the decision below with this Court's precedents. The need for corrective action by this Court is particularly acute because the manner in which the Court of Appeals has resolved the issue of tribal consent is likely to affect significantly the development of a "sub-

stantial number of important potential sites for the development of hydroelectric power" in the West and elsewhere, *id.* at 155, and will impede the salutary efforts of the Joint Board and others to develop such power sites. See Statement of Interest of Joint Board of Control, *supra* at 4-5; Petition for Writ of Certiorari at 7 and nn. 11 & 12.

The basic flaw of the holding below is the failure by the majority of the panel to perceive, and to give appropriate effect to, the interplay among the definition of "reservations" in Section 3(2) of the Federal Power Act, 16 U.S.C. § 796(2), the annual charges provisions embodied in Section 10(e), *id.* § 803(e), and the non-interference and non-inconsistency findings required of the Commission by Section 4(e), *id.* § 797(e). The Ninth Circuit appears to have misread the requirement that the Commission find that a license will not interfere or be inconsistent with the purpose of the reservation as itself contemplating or requiring Indian consent as a precondition to the issuance of a license.⁴ The panel majority accord-

⁴ The Joint Board believes that the divided panel's rather off-hand treatment of this point was premised on Circuit Judge Wright's extraneous dictum in *Lac Courte Oreilles Band v. Federal Power Comm'n*, 166 U.S. App. D.C. 245, 257-59, 510 F.2d 198, 210-12 (1975). That dictum was unnecessary to the disposition of the case before the Court of Appeals for the District of Columbia Circuit, and was in turn based on Commissioner Moody's dissenting opinion in the same case. *Id.* at 259, 510 F.2d at 212 (MacKinnon, J., concurring and dissenting).

Examination of Commissioner Moody's dissent reveals that his strained interpretation of the non-interference and non-inconsistency finding contemplated by Section 4(e) depends entirely upon an unexplained equation of "the purpose for which [a] reservation was created or acquired" with tribal sovereignty over tribal lands, and his resulting perception of the Indian veto power as an appropriate mechanism for vindication of the overriding purpose of tribal sovereignty. See *Northern States Power Company*, 50 F.P.C. 753, 776-79 (1973) (Moody, Commissioner, dissenting). As Judge MacKinnon noted in his concurring and dissenting opinion in *Lac*

ingly concluded that Section 4(e) did not conflict with Section 8 of the Mission Indian Relief Act, 26 Stat. 712, and thus that the latter statute was not repealed by Section 29 of the Federal Power Act, 16 U.S.C. § 823.

The panel's analysis fails to take account of the expansive scope of the Act's definition of "reservations," which mentions "tribal lands embraced within Indian reservations" as one category of the "lands and interests in lands owned by the United States," *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 112, 114 (1960). Because Indian lands owned by the United States as trustee (as in the case of the Mission Indian reservations) are lands in which the United States has an interest, they clearly are encompassed within the plenary delegation of congressional Property Clause power embodied in Section 4(e) of the Act, subject to the payment to the United States pursuant to Section 10(e) of annual charges "recompensing it [i.e., the United States] for the use, occupancy, and enjoyment of its lands or other property." See *Federal Power Comm'n v. Tuscarora Indian Nation*, *supra* at 114. By holding that the licensing of "tribal lands embraced within Indian reservations" is dependent upon tribal consent, the Court of Appeals has in effect judicially excised one discrete category of federal "reservations" from the licensing power which Congress has delegated to the Commission. This incon-

Courte, however, this interpretation of Section 4(e) is contrary to the legislative history of the Federal Power Act and "would prevent the use of any lands in a 'reservation' (including tribal lands) in a power project." 166 U.S. App. D.C. at 259, 510 F.2d at 212. In addition, Commissioner Moody's analysis ignores that the real substantive purpose of all reservations, i.e., to provide the Indians with a permanent home, see *Winters v. United States*, 207 U.S. 564, 576 (1908), cannot be interfered with or destroyed by any project in any case, because of the necessity for non-interference and non-inconsistency findings referred to above.

gruous reading of the statute creates two disparate schemes of licensing in which hydropower projects on Indian reservations can be licensed only with tribal concurrence, while the licensing of projects on all other federal "reservations" remains within the prerogative of the Commission, as Congress intended. This interpretation fundamentally disrupts the framework which Congress carefully constructed in Sections 3(2), 4(e) and 10(e) of the Act with respect to the licensing, use and compensation for use of lands or interests in lands in which the United States has an interest, and represents a marked departure from this Court's analysis of the statutory interplay in *Tuscarora Nation*, *supra*.

Judge Anderson's March 17, 1983 opinion concurring and dissenting from the panel majority's denial of the petitions for rehearing sets forth the correct analysis of Section 4(e), its legislative history, and its interrelationship with other provisions of the Federal Power Act. Judge Anderson correctly concluded that the Federal Power Act provides a "direct and specially-tailored scheme for appropriation of Indian lands" and that Sections 3(2), 4(e) and 10(e) of the Act furnished "express congressional authority for acquiring such property" notwithstanding the withholding of tribal consent.⁵ 701 F.2d 826,

⁵ Judge Anderson concluded that neither the Mission Indian Relief Act nor Section 16 of the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. § 476, provided "the exclusive means for obtaining rights-of-way by FPA licensees." 701 F.2d at 830; Appendix at 38-39. The dissenting Circuit Judge felt constrained to reach the issue of the effect of Section 16 because the San Pasqual Band, one of the bands withholding its consent to the licensing of Project No. 176, had adopted a tribal constitution pursuant to IRA. *Id.* at 829; Appendix at 38. The Joint Board believes that Judge Anderson's analysis is clearly correct, and that Section 16 of IRA cannot properly be read as inconsistent with FERC's authority to license Indian reservation lands pursuant to Section 4(e) of the Federal Power Act. But even if this were not so, and

829, 830; Appendix to Petition for Writ of Certiorari ("Appendix") at 36, 39. The pivotal portions of Circuit Judge Anderson's reasoning—and particularly his analysis, based on this Court's opinion in *Tuscarora Nation*, *supra*, of the parallelism between Sections 4(e) and 10(e) of the Act "in the tribal land sector" and the eminent domain power of Section 21 "in the private land sector," 701 F.2d at 828; Appendix at 36—appear to be based upon arguments which, to the best of the Joint Board's knowledge, were advanced only in its amicus brief which was rejected over Circuit Judge Anderson's dissent. Irrespective of the source of the analysis which dissenting Circuit Judge Anderson found persuasive, the crucial point is that the majority of the divided Ninth Circuit panel, having declined to accept the Joint Board's amicus brief, may not have considered, and in any case did not discuss, the analysis set forth therein before voting to deny rehearing on the Indian veto issue. This circumstance, indicating that the majority may not even have considered the analysis found persuasive by Judge Anderson, argues strongly for the need for most careful review by this Court.

This Court should also grant certiorari to review the Court of Appeals' holding that the conditions which the

IRA, like MIRA, could arguably be read to restrict the Commission's authority pursuant to Section 4(e), the Joint Board believes that such a reading would be erroneous because in 1935, subsequent to the enactment of IRA, Congress reenacted Section 4(d) of the Federal Water Power Act as Section 4(e) of the Federal Power Act, without in any way changing its language, and without any reference to Section 16 of IRA. Since the language and legislative history of Section 4(d) make it crystal clear that Congress did not intend the Commission's authority to license Indian reservations pursuant to Section 4(d) to be subject to Indian consent, *see* Petition for Writ of Certiorari at 9-10, it is plain that reenactment of Section 4(d) as Section 4(e) of the Federal Power Act worked any required *pro tanto* repeal of Section 16 of IRA, just as enactment of Section 4(d) worked a repeal, if and to the extent necessary, of Section 8 of MIRA.

Secretary of the Interior placed upon the license for Project No. 176 are mandatory upon FERC and that the Commission may not review Interior's determination that such conditions are "necessary for the adequate protection and utilization" of the reservation. 16 U.S.C. § 797(e). The decision below vitiates the preeminent position which Congress intended the Commission to occupy in the field of hydropower development by depriving it of any power to evaluate whether the conditions propounded by the Department of Interior subserve the Federal Power Act's overarching objective, expressed in Section 10(a), that a hydroelectric project be "best adapted to a comprehensive plan . . . for the improvement and utilization of waterpower development." *Id.* § 803(a). This Court should grant certiorari to review the panel's ruling in the interest of the orderly, coherent development of national hydropower policy to delineate with conclusive clarity the respective roles of, and allocation of responsibility between, FERC and the Department of Interior in the licensing of hydropower projects. See *Chapman v. Federal Power Commission*, *supra* at 155 (grant of the writ appropriate where "questions of importance" presented which "involve a conflict of view between two agencies of the Government having duties in relation to the development of national water resources").

The parties to the instant case agreed that the Secretary of the Interior's statutory power to propound conditions is limited by a standard of reasonableness; however, the opinion of the majority below contemplates that the Court of Appeals, on judicial review of licenses containing the Department of Interior's conditions, will be the first forum in which the reasonableness of those conditions will be reviewed. 701 F.2d at 827 & 831; Appendix at 32-33, 40-41. The Joint Board believes that this result ill serves the interests of judicial economy, as it requires the Court of Appeals to make a determination with re-

spect to reasonableness from *tabula rasa*, unaided by FERC's expert judgment or its comprehensive perspective concerning hydropower development. Moreover, placing the initial reasonableness decision on FERC is the only resolution of this issue which gives appropriate recognition and deference to the role which Congress assigned to FERC as an independent regulatory commission and which properly "preserve[s] the control of FERC over licensing." 701 F.2d at 831; Appendix at 41.

Finally, it should be noted that the majority's holding that the Secretary's action fixing conditions is unreviewable by FERC is inconsistent with the interpretation which the Court of Appeals for the District of Columbia Circuit has placed upon the cognate provisions of Section 10(e) of the Federal Power Act, 16 U.S.C. § 803(e), concerning secretarial approval of annual charges. In pertinent part, the first proviso of Section 10(e) directs FERC to fix annual charges for the use of Government dams or other structures "subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects." In *Montana Power Company v. Federal Power Comm'n*, 148 U.S. App. D.C. 74, 85, 459 F.2d 863, 874, *cert. denied*, 408 U.S. 930 (1972), the Court of Appeals eschewed a reading of Section 10(e) which would confer a conclusive "veto power" on the Secretary. Instead, the court's discussion indicates that the Commission must fix an annual rental after taking into account all pertinent factors including the recommendation of the Secretary of the Interior. The Secretary's only recourse, if dissatisfied, is to seek judicial review of FERC's action: "As is the situation with the Tribes, the Secretary can participate as a party and avail of the provisions for judicial review." *Id.* This Court should grant certiorari in this case to resolve this disparate judicial construction of Sections 4(e) and 10(e) of the Act.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

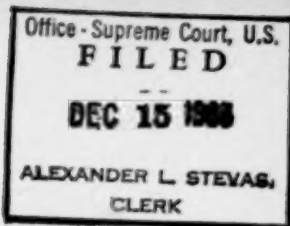
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July 15, 1983



No. 82-2056
IN THE

Supreme Court of the United States

October Term, 1983

ESCONDIDO MUTUAL WATER COMPANY, *et al.*,

Petitioners,

vs.

LA JOLLA BAND OF MISSION INDIANS, *et al.*,

Respondents.

On Certiorari to the United States
Court of Appeals for the Ninth Circuit.

BRIEF OF PETITIONERS.

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Questions Presented.

1. Does the Act of January 12, 1891, 26 Stat. 712, permit the Mission Indian Bands to veto the Commission's decision to relicense a federal power project by withholding consent to the continued use of reservation lands?

2. Does section 4(e) of the Federal Power Act permit the Secretary of the Interior to veto the Commission's decision to relicense a federal power project by imposing unreasonable conditions on the continued use of reservation lands?

3. Are Indian "water rights" a "reservation" within the meaning of section 4(e) of the Federal Power Act?

Parties to the Proceeding.

The Petitioners are the Escondido Mutual Water Company (Mutual), the City of Escondido (City) and the Vista Irrigation District (Vista). The Respondents are the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians (Bands); the Secretary of the Interior in his capacity as Trustee for the Bands (Interior); and, the Federal Energy Regulatory Commission (Commission).¹

¹The term "Commission" refers to both the Federal Power Commission and its successor, the Federal Energy Regulatory Commission. (See 42 U.S.C. §§7101-7295)

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	i
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	2
Statement of the Case	2
Background Facts	3
Summary of Argument	8
Argument	10

I.

The Federal Power Act Authorizes the Use of Mission Indian Reservation Land for Federal Power Projects Without Indian Consent	10
A. Congress Has Plenary Power Over Indian Lands	10
B. In Enacting the FPA, Congress Exercised Its Plenary Power Over Indian Land by Author- izing Its Use for Power Projects Without Indian Consent	11
1. The FPA Authorizes the Use of All Indian Reservations for Federal Power Projects	12
2. The FPA Authorizes the Use of All Indian Reservations Without Indian Consent	14
a. Congress Has Rejected the Require- ment of Indian Consent	14
b. The Commission Consistently Has Re- jected Any Requirement of Indian Con- sent	18
c. Section 4(e) Does Not Require Indian Consent	18

II.

MIRA Section 8 Does Not Require Indian Consent to the Use of Their Lands for Federal Power Projects	20
A. The FPA and MIRA Section 8 Can Be Harmonized Without Requiring Indian Consent	21
1. MIRA Section 8 Does Not Require Indian Consent to All Uses of Their Land	21
2. The FPA Is an Alternative to MIRA Section 8 for Obtaining Rights-of-Way Across Mission Indian Reservations	22
a. Congress Has Enacted Alternative Indian Right-of-Way Acts	22
b. Interior Has Not Interpreted MIRA Section 8 as the Exclusive Means of Obtaining Rights-of-Way Across Mission Indian Reservations	23
(1) Interior Granted Mutual Its 1908 Permit Pursuant to the Act of March 3, 1891	23
(2) Interior Relied on Other Rights-of-Way Statutes in Granting Mutual Rights-of-Way in the 1914 Contract	24
(3) Interior Did Not Refer to MIRA in Regard to the Issuance of the Original License for the Project No. 176 and Amendments Thereto	24
(4) Interior's Consistent Administrative Interpretation Is Entitled to Great Weight	25

c. Courts Have Construed Apparently Conflicting Right-of-Way Statutes as Independent, Alternative Methods for Obtaining Rights-of-Way Across Indian Lands	26
B. To the Extent That MIRA Section 8 Required Indian Consent to Power Project Rights-of- Way Across Mission Indian Reservations, It Was Repealed by the FPA	28
1. The FPA Impliedly Repeals MIRA Section 8 Because It Irreconcilably Conflicts With It	28
a. Congress Intended to Repeal All Acts Inconsistent With the FPA	28
b. The FPA Irreconcilably Conflicts With Any Consent Requirement of MIRA Section 8	29
2. The FPA Impliedly Repeals MIRA Section 8 by Totally Occupying the Field of Water Power Development on Federal Lands	30
a. On Its Face the FPA Evinces a Com- prehensive Scheme for the Develop- ment of Water Power	31
b. The FPA's Legislative History Demonstrates That Congress Intended It to Supplant Earlier Legislation	31

III.

The Commission May Reject Unreasonable Secre- tarial Conditions	32
A. When Read as a Whole, the FPA Evinces Congress' Intent That the Commission Have the Final Authority to Mold a Proposed Project Into One Best Adapted to the Public Benefit	33

	Page
B. The FPA's Legislative History Supports the Commission's Independence	34
C. The Commission Consistently Has Interpreted the FPA as Mandating the Inclusion of Only Those Secretarial Conditions It Deems Reasonable	37
D. The Reasonableness of Any Section 4(e) Conditions Must Be Determined by the Commission	38
E. The Commission Lacks Authority to Include Interior's Conditions Without Modification	39
1. Interior's Conditions Are an Impermissible Attempt to Adjudicate Water Rights Within a Commission Proceeding	40
2. The Inclusion of Interior's Conditions Would Contravene the Commission's Duty Under Section 10(a)	41
F. In Any Event the FPA Does Not Require the Imposition of Secretarial Conditions in a Relicensing Situation	42

IV.

The Ninth Circuit's Holding That "Water Rights" Are a "Reservation" for Section 4(e) Purposes Is a Strained and Unnecessary Interpretation That Jeopardizes All Federal Power Projects	44
A. The Ninth Circuit's Interpretation Is Inconsistent With Both the Statutory Language and the Commission's Longstanding Interpretation of It	44
B. It Was Unnecessary for the Ninth Circuit to Distort the Meaning of the FPA in Order to Protect Indian Water Rights	46
Conclusion	46

TABLE OF AUTHORITIES

Cases	Page
American Paper Inst., Inc. v. American Electric Power Service Corp. (1983) — U.S. —, 76 L.Ed.2d 22	18, 38
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Barker v. Harvey (1901) 181 U.S. 481	4
Bryant v. Yellen (1980) 447 U.S. 352	26
California v. United States (1978) 438 U.S. 645	25
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	Page
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First Iowa Hydro-Elec. Co-op. v. Federal Power Comm'n (1946) 328 U.S. 152, reh'g denied 328 U.S. 879	29, 30, 33, 40
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NAACP v. FPC (1976) 425 U.S. 662	45
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Oliphant v. Suquamish Indian Tribe (1978) 435 U.S. 191	10

	Page
Pacific Gas & Electric Co., Project 1962 (1947) 6 FPC 729	37
Pacific Gas & Electric Co. (1975) 53 FPC 523	37, 43
Pigeon River Lumber Co. (1935) 1 FPC 206.....	18, 37, 45
Posadas v. National City Bank (1935) 296 U.S. 497	28
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Rice v. Rehner (1983) ____ U.S. ____, 77 L.Ed.2d 961	27
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Rincon, et al., Bands of Mission Indians v. United States, Ct. of Claims, Docket 80-A	2
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Scripps Howard Radio v. F.C.C. (1942) 316 U.S. 4	12
Seneca Nation v. United States (1964 2d Cir.) 338 F.2d 55, cert. denied (1965) 380 U.S. 952	11
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	Page
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--	--------

	Page
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Act of March 3, 1901, 31 Stat. 1084, 25 U.S.C. §357	26, 27
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Title II of Act of August 26, 1935, 49 Stat. 838, Public Utility Act of 1935, 16 U.S.C. §791a, et seq. (Federal Power Act (FPA))	passim
§3(2), 16 U.S.C. §796(2)	12, 45
§4(e), 16 U.S.C. §797(e)	passim
§6, 16 U.S.C. §799	33
§7(a), 16 U.S.C. §800(a)	41
§10(a), 16 U.S.C. §803(a)	33, 39, 41, 42
§10(e), 16 U.S.C. §803(e)	6, 12, 13, 16, 37
§10(i), 16 U.S.C. §803(i)	13, 34
§14, 16 U.S.C. §807	5, 43

	Page
§14(b), 16 U.S.C. §807(b)	6
§15, 16 U.S.C. §808	39, 43
§15(a), 16 U.S.C. §808(a)	5, 43, 44
§15(b), 16 U.S.C. §808(b)	5
§17(a), 16 U.S.C. §810(a)	13
§21, 16 U.S.C. §814	16
§27, 16 U.S.C. §821	39, 40
§29, 16 U.S.C. §823	28, 29
Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. §323, et seq.	17, 26, 27
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	Page
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No. 82-2056
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ESCONDIDO MUTUAL WATER COMPANY, *et al.*,
Petitioners,

vs.

LA JOLLA BAND OF MISSION INDIANS, *et al.*,
Respondents.

BRIEF OF PETITIONERS.

Opinions Below.

The Ninth Circuit Opinion is at 692 F.2d 1223. (PA 1-30)² The Order denying rehearing is at 701 F.2d 826. (PA 31-41) Commission Opinion and Order No. 36 is at 6 FERC ¶61,189. (PA 42-309) Commission Opinion and Order No. 36-A on rehearing is at 9 FERC ¶61,241. (PA 310-78) The Initial Decision of the Administrative Law Judge (ALJ) is at 6 FERC ¶63,008. (JA 243-368)

Statement of Jurisdiction.

The Ninth Circuit opinion was filed November 2, 1982. On March 17, 1983, the Ninth Circuit denied rehearing. Petitioners filed their Petition for Writ of Certiorari June 15, 1983. The Petition was granted October 17, 1983. The Court has jurisdiction under 28 U.S.C. §1254(1).

²The following abbreviations are used:

- (1) COR — the Certificate of Record — a listing of Commission documents filed with the Ninth Circuit in lieu of the record;
- (2) NJA — the Ninth Circuit Joint Appendix;
- (3) PA — the appendix to Petitioners' Petition for Writ of Certiorari; and,
- (4) JA — the Joint Appendix in this proceeding.

Statutes Involved.

Statutes involved include provisions of the Federal Power Act (FPA),³ 16 U.S.C. §791a, *et seq.* (PA 380-88), and the Mission Indian Relief Act (MIRA) Section 8. (PA 379-80)

Statement of the Case.

The issues⁴ arise from the Commission's 1979 decision to issue a new license for Project 176 to Petitioners.

Project works include: the Escondido Canal, which conveys water from the San Luis Rey River (River) across the La Jolla, Rincon and San Pasqual Indian Reservations, and other government and private lands, to Lake Wohlford near Escondido; (2) Lake Wohlford Dam and Reservoir; (3) the Bear Valley powerhouse,⁵ located on private land; and, (4) the Rincon powerhouse, located on the Rincon Reservation. The Pauma⁶ and Pala Indian Reservations are within the River's watershed, but several miles from any Project works. (See PA 30 for a map of the Project)⁷

³All section references are to the FPA. For parallel citations to the United States Code, see the Table of Authorities, *supra*.

⁴The controversy is being waged in two additional fora: (1) *Rincon, et al., Bands of Mission Indians v. United States*, Ct. of Claims, Docket 80-A (suit seeking damages for violation of Indian water rights); and, (2) *Rincon Band, et al. v. Escondido Mutual Water Co.*, S.D. Cal. Nos. 69-217-S, 72-271-S and 72-276-S (suits by Bands and United States seeking to void certain right-of-way and water contracts, damages and injunctive relief).

⁵Although in March, 1980, the Bear Valley powerhouse was destroyed by a mudslide, it has been reconstructed and is being expanded. See *Escondido Mutual Water Co., Project Nos. 176-013 and 176-014* (1983) 24 FERC ¶61,288 (Commission accepts Stipulation permitting reconstruction and expansion) An additional application to add a third powerhouse to the project is pending.

⁶The two Yuima tracts are under the jurisdiction of the Pauma Band, and contain no project works.

⁷Project No. 176 occupies approximately 1,200 acres. Of this, 87.4 acres (7.3%) are Indian Reservation land, 406.1 acres (33.8%) are other federal land, 662 acres (55.2%) are owned by Mutual, and 43.9 acres (3.6%) are other private lands over which Mutual has rights-of-way. (PA 51) When Vista's Henshaw Dam and reservoir are included the Indian reservation lands will comprise less than 2% of Project No. 176.

Background Facts.

Commencing in 1891, Mutual's predecessor, the Escondido Irrigation District, made several water filings on the River, and adopted a plan to divert its flow through the Escondido Canal to Lake Wohlford. (PA 49)

Because the canal would cross the newly patented La Jolla Reservation,⁸ the District entered into a contract in June 1894 with the Potrero (La Jolla) Band or Village of Mission Indians which provided a right-of-way through the Reservation, and gave the La Jolla and Rincon Indians the right to tap the canal for water. The contract was approved by both the Office of Indian Affairs and Interior. (JA 9-13) The District's conduit and reservoir were completed by September 1895. (PA 51)

In 1905 Mutual acquired the District's assets, including its water rights and rights-of-way. (*Ibid.*) In March 1908, Interior granted Mutual a permit under the Act of March 3, 1891, former 43 U.S.C. section 946, which confirmed its rights-of-way across all federal land, including the La Jolla, Rincon and San Pasqual Reservations, for the Escondido Canal and appurtenant facilities. (NJA 472; PA 49 n.16)

Meanwhile, Interior realized that its proposed Rincon Indian irrigation system would require wells. (NJA 476) Because Interior needed power for pumping, its interests coincided with Mutual's plan to develop and distribute electric power. (*Ibid.*) In 1914 the United States, on behalf of

⁸As early as 1875, some land had been set aside by Executive Orders for Indian reservations. (NJA 456 (La Jolla - 1875), 460 (Rincon - 1881), 2547 (Pala - 1875)) Following the passage of MIRA in January, 1891, each reservation was permanently established. In 1892 and 1893, trust patents were issued for the Potrero (La Jolla), Rincon and Pala Reservations. (See NJA 458 (La Jolla), 460-61 (Rincon), 2548 (Pala)) From 1891 to 1893, quitclaim deeds were obtained from private parties and the Pauma Reservation was established. (NJA 2556) In 1910, quitclaim deeds were obtained from settlers and the San Pasqual Reservation was patented. (NJA 465-66) Additional land later was added to each Reservation except La Jolla. (NJA 461-62 (Rincon), 467 (San Pasqual), 2548-53 (Pala), 2558 (Pauma))

the Rincon Reservation, entered into a contract with Mutual which: modified the 1894 contract; recognized and quantified Rincon water rights; gave Mutual rights-of-way across the Rincon and San Pasqual Reservations; permitted Mutual to erect and maintain the Rincon power plant; and required Mutual to provide the Indians with water through the power plant and power for pumping. (JA 22-27)

In 1914, Mutual applied for additional rights-of-way across federal lands pursuant to the Act of February 15, 1901, former 43 U.S.C. section 951, and the Act of March 4, 1911, former 43 U.S.C. section 961. In 1921 these applications were transferred to the newly-formed Commission. (PA 54)

Commencing in 1911 Vista's predecessor, William Henshaw, made water filings on the River. (PA 51)⁹ In 1912 Henshaw obtained Mutual's consent to his dam. (PA 52) In June 1922 the United States, acting for the Indians of the Rincon and Pala Reservations, also consented. (JA 28-38)¹⁰

In September 1922, Henshaw conveyed Warner's Ranch and all of its water and related rights to the San Diego County Water Company. (PA 56) In November 1922, the Company entered into an agreement which permitted Mutual to purchase Henshaw-stored water and allowed the Company to use the Escondido Canal. (PA 56-58)

⁹The filings were on Warner's Ranch at the site of what is now Henshaw Dam. (See map at PA 30) Henshaw had purchased Warner's Ranch around the turn of the century. The 43,402-acre ranch was confirmed against Indian claims. (*Barker v. Harvey* (1901) 181 U.S. 481; *United States v. Title Insurance and Trust Co.* (1924) 265 U.S. 472 (PA 51))

¹⁰In return for Henshaw providing flood control protection, recognizing Rincon and Pala water rights, and providing water and power guarantees, the United States agreed to "interpose no objection to the construction, maintenance and use of the said proposed dam and reservoir at 'Warner's Ranch' on the said San Luis Rey River, and diversion of the waters which shall be impounded therein." (JA 30)

The validity and effect of the June 1922 contract are issues in the other Court proceedings, *supra*, n. 4.

On December 25, 1922, the floodgates at Henshaw Dam were closed. (PA 58) In October 1924, Vista became the other major purchaser of Henshaw-stored water.¹¹ (PA 60)

Mutual informed the Commission of the November 1922 contract and was assured by its Executive Secretary, O. C. Merrill, that the contract did not conflict with the proposed license. (PA 59-60) On June 25, 1924, Mutual was issued a license for Project 176. (PA 60)

During the remainder of the original license term, it was amended several times to include project additions and betterments. (PA 61, 63) Mutual and Vista entered into additional agreements (PA 62, 63-64), and the City of Escondido commenced acquiring Mutual. (PA 65-66)

In 1971, Mutual applied pursuant to section 15(a), for a new license to operate Project No. 176.¹² The Bands and Interior intervened.¹³ (PA 69-70)

The Bands sought a nonpower license under Section 15(b). Interior recommended federal takeover under section 14, or alternatively, supported the Bands' application. (PA 70-72) If those alternatives failed Interior sought the same result by imposing section 4(e) conditions which would make Mutual's operation of the Project "... resemble the operations under the non-power license or recapture alternative." (See JA 300)

On June 1, 1977, the ALJ issued his Initial Decision. (JA 243-368) He ruled that because power production was so incidental to the Project's major purpose — irrigation — the Commission lacked jurisdiction to relicense it; but, if

¹¹In 1946 Vista became the successor to San Diego County Water Company. It presently owns and operates Henshaw Dam, Lake Henshaw and Warner's Ranch. (PA 63)

¹²Since the original license expired in June, 1974, Mutual has operated the Project under annual licenses. (See, e.g., 51 FPC 1610 (1974))

¹³The Order permitting intervention (46 FPC 253) also consolidated Mutual's relicensing application with Docket E-7562, a September, 1970 Complaint by Interior (PA 66-69) and Docket E-7655, an investigation of Vista's involvement in Project No. 176.

the Commission found jurisdiction, then a new fifty-year license should issue to Mutual, City¹⁴ and Vista.¹⁵

On February 26, 1979, the Commission issued Opinion No. 36 (PA 42-309), and ruled, *inter alia*, that: it had jurisdiction over Project No. 176; a new license should issue to Petitioners; section 10(e) annual charges for the use of Indian lands should be substantially increased; and, the new license should be subject to additional conditions, including the delivery of water to the Bands.

The Commission granted rehearing and in Opinion No. 36-A (PA 310-78), ruled *inter alia*, that: Mutual's net investment was zero; if the Project were not relicensed to Mutual, it would not be entitled to severance damages; and, a new licensee need not assume Mutual's contracts. Opinion No. 36-A also modified the annual charges and clarified the requirement to supply the Indians water. Issuance of the new license was stayed for two years pursuant to section 14(b), so Interior could attempt to persuade Congress to authorize federal takeover.¹⁶

All parties except the Commission petitioned for review.

On November 2, 1982, the Ninth Circuit issued its decision. (PA 1-30) It affirmed the Commission's jurisdiction, but, held that: in addition to securing a federal power license, MIRA section 8 required petitioners to obtain rights-of-way for the Project from the Bands; section 4(e) required the Commission to include in the new license, any conditions proposed by Interior without regard to their reasonableness; and, Indian "water rights" were a section 4(e) "reservation."

¹⁴In 1975, City filed an application seeking to become a joint applicant with Mutual. (NJA 3824-25)

¹⁵The importance of Henshaw Dam to the Project convinced the ALJ to include it as part of the Project works and make Vista a joint licensee.

¹⁶That stay expired without Congressional action. On November 20, 1982, the Commission issued a new stay pending completion of judicial review. (17 FERC ¶61,157)

All parties petitioned for rehearing, and on March 17, 1983, the Court denied rehearing. (PA 31-41)

Circuit Judge Anderson dissented. He wrote that: the majority's interpretation of MIRA section 8 "conflicts with the Federal Power Act's . . . pervasive scheme for obtaining rights-of-way over tribal land" (PA 34); the "legislative history [of MIRA] bears no indication that Congress intended Section 8 as the exclusive means of obtaining rights-of-way" (PA 34); the "[l]egislative history of the FPA is also at odds with our opinion" (PA 37); and, that "Sections 3(2), 4(e) and 10(e) of the FPA are express congressional authority for acquiring such property." (PA 39) He also "would place the initial reasonableness decision [respecting Interior's conditions] on FERC" and concluded that "FERC properly interpreted and applied Section 4(e) and that all of its findings in that regard are supported by substantial evidence." (PA 41)

On June 15, 1983, Petitioners filed a Petition for a Writ of Certiorari. Supporting amicus briefs were filed by: the Joint Board of Control of the Flathead, Mission and Jocko Valley Irrigation Districts of the Flathead Irrigation Project, Montana; the Colorado River Water Conservation District and Kings River Conservation District; and, the American Public Power Association.

The Bands filed a Brief in Opposition, and the Solicitor General filed a Brief for the Federal Respondents (Interior and the Commission)¹⁷ in Opposition. Following additional filings,¹⁸ the Court granted the Petition on October 17, 1983. (JA 375)

¹⁷In fact, the Commission did not oppose the petition, but requested the Solicitor General to file one. The Solicitor General obtained an extension of time to file a petition (see Orders dated June 6 and July 8, 1983, *Federal Energy Regulatory Comm'n v. San Pasqual Band of Mission Indians, et al.*, Docket A-970), but did not file one.

¹⁸On September 26, 1983, Petitioners filed a Reply Brief. The Bands subsequently filed a Motion seeking leave to file a Supplemental Brief responding to arguments raised in the Amici Briefs.

Summary of Argument.

The holding that MIRA section 8 requires Indian consent to the use of Mission Indian lands for federal power projects is wrong.

It overlooks Congress' plenary power over Indian lands and ignores the FPA's "specifically tailored scheme" for the use of such lands in the comprehensive development of the nation's water power.

The FPA's legislative history shows that Congress: (1) authorized the use of all Indian lands for power projects; and, (2) rejected any requirement of Indian consent. Later Congresses refused to impose a consent requirement and both Interior and the Commission have long interpreted the FPA as not requiring consent.

By ignoring the FPA's legislative history and longstanding administrative interpretation, the Court failed to properly harmonize it with MIRA. Because the FPA was intended to permit the use of Indian lands without Indian consent, it can only be harmonized with MIRA by not requiring such consent. This can be accomplished either by recognizing that MIRA does not require Indian consent to all uses of Mission Indian reservations, or that MIRA and the FPA are independent, alternative methods of obtaining rights-of-way across such lands.

If, as the Ninth Circuit held, MIRA requires Indian consent, then the FPA impliedly repealed it either by irreconcilably conflicting with the consent requirement or by totally occupying the field of water power development on Indian lands.

The Ninth Circuit similarly erred when it concluded that section 4(e) required the inclusion, without modification, of Interior's conditions in the new license. Its holding fails to give effect to the Act as a whole and ignores contrary legislative history and longstanding administrative interpretation. More importantly, it allows Interior to usurp the

Commission's overriding authority to license the project best adapted to beneficial public uses.

The Court's MIRA section 8 and section 4(e) holdings give the Bands and Interior a veto over Project No. 176. Its sweeping definition of "reservation" extends such vetoes over nearly every power project in the West. The Ninth Circuit's decision thus subordinates the greater public interest in water power development to narrow, parochial interests. It must be overturned.

ARGUMENT.

I.

THE FEDERAL POWER ACT AUTHORIZES THE USE OF MISSION INDIAN RESERVATION LAND FOR FEDERAL POWER PROJECTS WITHOUT INDIAN CONSENT.

The issue of Indian consent in this case can be resolved by answering two questions: (1) Does Congress have the power to dispose of Indian lands without Indian consent? and (2) If so, did Congress intend to exercise that power when it enacted the FPA?

A. CONGRESS HAS PLENARY POWER OVER INDIAN LANDS.

The Ninth Circuit majority ignored Congress' plenary power over Indian land. Instead, it began its analysis with a sweeping generalization respecting Indian sovereignty followed by the observation that "a tribe's title to its lands cannot ordinarily be extinguished without tribal consent." (PA 18) It then forced the FPA into the Procrustean bed of Indian consent.

Modern cases avoid reliance on "platonic notions of Indian sovereignty" and look instead to applicable treaties and statutes. (*McClanahan v. Arizona Tax Comm'n* (1973) 411 U.S. 164, 172.) Tribes may not exercise powers of autonomous states which are "inconsistent with their status." (*Oliphant v. Suquamish Indian Tribe* (1978) 435 U.S. 191, 208) Indian sovereignty exists only at the sufferance of Congress and is subject to complete defeasance. (*United States v. Wheeler* (1978) 435 U.S. 313, 323) Although one aspect of Indian sovereignty is the power to exclude non-Indians from Indian land (See, e.g., *Merrion v. Jicarilla Apache Tribe* (1982) 455 U.S. 130, 137), tribal sovereignty must give way to overriding national interests. (*State of Washington v. Confederated Tribes of the Colville Reservation* (1980) 447 U.S. 134, 153) Here, overriding national

interests would be frustrated by requiring Indian consent to the use of their land for federal power projects.

Congress has plenary power over Indian land and can authorize its use without tribal consent, and in abrogation of preexisting rights. (See, e.g., *Cherokee Nation v. Southern Kansas Railway Co.* (1890) 135 U.S. 641 (Congress authorized a railroad right-of-way through an Indian reservation even though it violated the treaty establishing the reservation). Such right-of-way grants are effective even when the authorization act does not specifically mention the Indian reservation. (*Spalding v. Chandler* (1896) 160 U.S. 394) Congress need not specifically authorize by special enactment each particular taking of Indian land, but can delegate authority to administrative officers and agencies. (*Seneca Nation v. United States* (1964 2d Cir.) 338 F.2d 55, 56-57, *cert. denied* (1965) 380 U.S. 952)

The Ninth Circuit's reliance on *Wilson v. Omaha Indian Tribe* (1979) 442 U.S. 653, and *Cherokee Nation v. State of Georgia* (1831) 30 U.S. (5 Pet.) 1 (PA 18) is misplaced. Those cases construed the power of states and private persons to dispose of Indian land without tribal consent. It is clear that the federal government faces no such restriction. Its power over Indian lands is plenary.

B. IN ENACTING THE FPA, CONGRESS EXERCISED ITS PLENARY POWER OVER INDIAN LAND BY AUTHORIZING ITS USE FOR POWER PROJECTS WITHOUT INDIAN CONSENT.

The holding that, in addition to an FPA license, Petitioners must obtain the Bands' consent for rights-of-way across their reservations, pursuant to MIRA section 8 (PA 20), gives them a veto over Project 176. It is contrary to express congressional intent, and is inconsistent with longstanding administrative interpretation.

The Ninth Circuit majority ignored the FPA's comprehensive scheme for licensing federal power projects. Instead, it began and ended its analysis with an examination

of MIRA, an uncodified 1891 statute. By freezing time and events as of January 1891 (But *cf.*, *Scripps Howard Radio v. F.C.C.* (1942) 316 U.S. 4, 9 ("No court can make time stand still")), it concluded that Congress intended not only to bind its own hands¹⁹ but those of future Congresses by providing an exclusive method of obtaining rights-of-way across Mission Indian Reservations.

The proper starting point of analysis is the FPA, not MIRA.

1. The FPA Authorizes the Use of All Indian Reservations for Federal Power Projects.

Federal Power Act section 4(e) empowers the Commission "to issue licenses. . . upon any part of the public lands and reservations of the United States. . . ." (PA 381) Section 3(2) defines "reservation" to include "Tribal lands embraced within Indian reservations." (PA 380)²⁰

¹⁹In fact, the same Congress later enacted the Act of March 3, 1891, former 43 U.S.C. §946, which authorized Interior to grant rights-of-way through Indian reservations for reservoir and canal purposes without Indian consent. (See *United States v. Portneuf-Marsh Valley Irrigation Co.* (1913 9th Cir.) 213 F. 601; see also *IA Sutherland, Statutes and Statutory Construction* (4th Sands Ed.) §23.17 (Absent an irreconcilable conflict, two acts passed by the same legislature should both be given effect. However if they cannot be reconciled, the later statute will operate to repeal the prior statute.))

²⁰In *Federal Power Comm'n v. Tuscarora Indian Nation* (1960) 362 U.S. 99, 118, this Court emphasized the comprehensive nature of the FPA, stating:

"The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. See §4(e). It neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians — tribal lands embraced within Indian reservations. See §§3(2) and 10(e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians."

The FPA embodies a detailed scheme for the use of Indian lands. Section 4(e) permits the Commission to license the use of tribal lands within an Indian reservation upon finding "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." (PA 381) Section 4(e) also states that licenses "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." (*Ibid.*) Section 10(e) permits the Commission to "fix a reasonable annual charge for the use" of "tribal lands embraced within Indian reservations" which charges are subject to periodic readjustment. (PA 383) Section 10(i) permits the Commission to waive most conditions for a minor project, but does not allow it to waive annual charges for the use of Indian lands. (PA 384) Section 17(a) requires all proceeds from Indian reservations to be placed to their credit.

Congress understood that the FPA authorized the use of Indian lands. An initial reference to Indians in the legislative history concerned proposed amendments to section 17(a) which would have eliminated the requirement that proceeds from Indian reservations be credited to the Indians. In opposing the amendment (which was rejected) Congressman Esch stated:

"If *these proceeds* are put into the Treasury as miscellaneous receipts, they will be swallowed up and would not be permitted *to be used for the Indians whose lands are taken*." (58 Cong. Rec. 2235 (1919)) (emphasis added)²¹

Later Senator Nugent pointed out that the FPA would authorize the use of both treaty and statutory reservations:

"[T]he pending measure provides . . . [the] commission . . . power to issue licenses . . . *within* Indian

²¹Emphasis is added unless otherwise indicated.

reservations that were ceded to the Indians by . . . treaty . . . [and] *within* Indian reservations generally — that is, Indian reservations that were granted to the Indians by act of Congress." (59 Cong. Rec. 1566 (1920))

2. The FPA Authorizes the Use of All Indian Reservations Without Indian Consent.

a. Congress Has Rejected the Requirement of Indian Consent.

During floor debate on the FPA, the Senate debated the following amendment to what eventually became section 4(e) of the Act:

"That in respect to tribal lands embraced within Indian reservations, which said lands were ceded to Indians by the United States by treaty, no license shall be issued except by and with the consent of the council of the tribe. (59 Cong. Rec. 1534 (1920))

Senator Nelson stated: "I do not believe in that amendment. It would allow a few Indians to hold up an improvement; but I am willing that it shall go to conference." (*Ibid.*)

Later, Senator Walsh moved to reconsider the amendment, stating that he saw no reason to require Indian consent where their interests would be adequately protected by Interior. (*Id.* at 1564) He concluded: "There are obstacles enough in the way of the development of these power sites without submitting the question to a vote of the council of an Indian tribe." (*Ibid.*)

Senator Curtis supported the amendment, but conceded that Congress had plenary power over Indian lands: "It is true that the Supreme Court has decided that the Congress has a right to pass laws disposing of their property without their consent if it is thought for the best interest of the Indians. . . ." (*Id.* at 1565)

Senator Meyers opposed the amendment:

"I think this amendment would be a most unfortunate, unfair, and unjust provision of law. I do not desire to be unfair to the Indians. . . . Neither do I think Indians

should be allowed to be unfair to other people; I do not think they should be entrusted with arbitrary and absolute power to be unfair and unreasonable to other people.

If this amendment becomes a law, it would be in the power of a tribe of Indians, arbitrarily and without any reason whatever, to block a project for water-power development so that it could never be established at all. They would have an absolute power of veto.

If there be on an Indian reservation where the land was ceded to Indians by treaty a site suitable for the development of water power which, if developed, would result in vast and untold good to the public, and if a little land be required for putting in the dam and erecting the plant, and for transmission lines, involving only a very small part of the Indian reservation — perhaps only a few acres out of millions of acres — according to this amendment it would be in the power of the tribe of Indians to block forever the undertaking. I think it unreasonable." (*Ibid.*)

Senator Walsh also emphasized Congress' plenary power:

"[T]he Congress of the United States represents the people of the entire country owning the remainder of the public land, and we are going to take their property and give the disposition of that property to the commission which is created by the bill, with power to issue a license which shall permit occupancy of the property; *but the matter of the Indians whose lands we are also charged with the disposition of is put in the hands of the commission too.* We treat them just exactly as we treat the entire people of the United States. . . . *The lands are subject to disposition by the Government of the United States through the Congress as guardians*

of these Indians.” (*Id.* at 1568)²²

The debate closed with Senator Curtis reading from *Lone Wolf v. Hitchcock* (1902) 187 U.S. 553, 566:

“The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the Government in disregarding the stipulations of the treaty, but may demand in the interest of the country and the Indians themselves, that it should do so.” (*Id.* at 1570)

The amendment went to conference; but, was stricken from the bill because:

“The conferees saw no reason why waterpower should be singled out from all other uses of Indian reservation land for special action of the council of the tribe.” (H.R. Rep. No. 910, 66th Cong., 2d Sess. at 8 (1920))

The FPA’s legislative history demonstrates that in enacting the FPA, Congress: (1) understood that it had the power to make plenary disposition of all Indian lands without Indian consent; (2) fully debated a provision that would have required Indian consent; and, (3) decided not to require such consent in the full knowledge that by so doing preexisting Indian rights might be abrogated in order to effect the overriding national interest in water power development.

Later Congresses also have rejected the requirement of Indian consent to the use of Indian land for power project

²²Thus, contrary to the Ninth Circuit’s implication (PA 21 n.7), the FPA no more infringes on Indian property rights than on those of private citizens. It protects the rights of both. As Judge Anderson noted in his dissent:

“[U]nlike privately owned property which a licensee may condemn under § 21, tribal lands within an Indian reservation may be used only upon payment of an annual rental charge. FPA § 10(e) . . . Congress intended FPA §§ 4(e) and 10(e) to be the counterparts in the tribal land sector to FPA § 21 in the private land sector.” (PA 35-36)

His conclusion accords with this Court’s analysis in *Federal Power Comm’n v. Tuscarora Indian Nation* (1960) 362 U.S. 99, 113, that section 10(e) is the functional equivalent of section 21 for acquiring Indian land.

purposes.

In 1948, Congress passed a general Indian right-of-way act, 25 U.S.C. §§323-328. Although the Act requires the consent of certain organized tribes²³ to rights-of-way "for all purposes" across their reservations, it exempts rights-of-way granted under the FPA.²⁴

In its 1951 regulations implementing the Act, Interior also made it clear that the requirement of tribal consent was not to affect the Federal Power Commission's authority to license the use of Indian lands.²⁵

In 1967, Interior proposed regulations which would have permitted it to grant rights-of-way across certain tribal lands without Indian consent. (See 32 Fed. Reg. 5512 (1967)) The proposal was reviewed by the House Committee on Government Operations. (See H.R. Rep. No. 91-78, 91st Cong., 1st Sess. (1969)) The Committee, in addition to urging that Interior not adopt the proposed regulations, recommended:

"Consideration should be given to amending the Indian Right-of-Way Act to require tribal consent to *all* right-of-way grants of tribal land. . . ." (*Id.* at 4)²⁶

The Committee report indicates that it knew there were a number of right-of-way statutes including the FPA that permitted the use of Indian lands without their consent. (*Id.*

²³See 25 U.S.C. §324.

²⁴25 U.S.C. §326 provides:

"Sections 323 and 328 of this title shall not in any manner amend or repeal the provisions of the Federal Water Power Act. . . ."

²⁵"The regulations in this part do not cover the granting of rights-of-way for primary hydroelectric transmission lines over and across tribal lands. Applications for such rights-of-way must be filed with the Federal Power Commission." (25 CFR §256.2(b) (1951), 16 Fed. Reg. 8578 (1951))

²⁶The Committee proposed to amend 25 U.S.C. §324, to read as follows:

"Sec. 2. No grant of a right-of-way and across any lands belonging to any tribe shall be made *pursuant to this or any other act of Congress* without the consent of the proper tribal officials. . . ." (*Id.* at 19)

at 19 n.17) It recommended amending the general right-of-way statute to require Indian consent in *all* cases. Although the Committee's recommendations regarding Interior's proposed regulations were heeded, its proposal to amend the general right-of-way statute was never accepted by Congress.²⁷

b. The Commission Consistently Has Rejected Any Requirement of Indian Consent.

The Commission always has interpreted section 4(e) as empowering it to license the use of Indian reservations without Indian consent. (See *Pigeon River Lumber Co.* (1935) 1 FPC 206 (Commission can issue a preliminary permit for a project using tribal lands without Indian consent); *Lac Courte Oreilles Band v. Federal Power Comm'n* (1975 D.C. Cir.) 510 F.2d 198 (lack of Indian consent does not prevent the Commission from issuing an annual license for use of tribal lands); *Northern States Power Co., Project 108* (1980) 13 FERC ¶61,055 (lack of Indian consent does not prevent the Commission from relicensing a project using tribal lands)).²⁸

The Commission's consistent and reasonable interpretation of its own Act is entitled to great deference. (See, e.g., *American Paper Inst., Inc. v. American Electric Power Service Corp.* (1983) ___ U.S. ___, 76 L.Ed.2d 22, 38-39)

c. Section 4(e) Does Not Require Indian Consent.

Despite the FPA's legislative history and the Commission's consistent, contrary administrative interpretation, the Ninth Circuit majority read an Indian consent requirement

²⁷The Ninth Circuit majority's reliance on this same House report (PA 18-19) is misplaced. The House Committee recognized that Indian consent was *not required for all rights-of-ways, including those granted pursuant to the FPA; its proposal to make Indian consent a requirement was not accepted by Congress.*

²⁸Interior itself has not always required Indian consent to the use of their lands in federal power projects. In 1938 it approved an amendment to Mutual's license even though the La Jolla Band would not consent. (See NJA 1387, 1388)

into section 4(e). Apparently relying upon certain dicta in *Lac Courte Oreilles Band v. Federal Power Comm'n* (1975 D.C. Cir.) 510 F.2d 198, 210-12,²⁹ it stated that section 4(e) "would be meaningless if Congress meant to extinguish preexisting Indian rights wherever they came into conflict with the Commissioner's comprehensive jurisdiction over power projects on federal lands." (PA 21)³⁰

The lack of a consent requirement has not rendered section 4(e) meaningless. The Commission has not issued licenses where it found a project would interfere with or be inconsistent with a reservation. (See, e.g., *Southern California Edison Co., Project 120* (1977) 11 F.P.S. 5-416, 427 (the Commission found a transmission line project inconsistent with the 105-acre Cold Springs Indian Reservation where the proposed project would utilize 10.12 acres (9.7%) of the reservation); see also *Power Authority of the State of New York* (1959) 21 FPC 146, 147, *reh'g denied* 21 FPC 273,³¹ *aff'd sub nom. Tuscarora Indian Nation v. Federal Power Comm'n* (1959 D.C. Cir.) 265 F.2d 338, *rev'd on other grounds*³² (1960) 362 U.S. 99 (Commission majority

²⁹The majority stated that the issue of whether the Commission could relicense a project without Indian consent was "not ripe for review" (see 510 F.2d at 200, 210), but criticized the Commission's reasoning that the FPA had abrogated Indian rights under an 1854 treaty and instead indicated that in making any section 4(e) finding, the Commission must first assess Indian rights under relevant treaties and statutes. (*Id.* at 211-12)

³⁰It is difficult to understand how the Ninth Circuit could reach such a conclusion when the FPA's legislative history (see discussion *supra*, 14-16) shows that Congress expressly decided to abrogate preexisting Indian rights to the extent such rights would permit them to withhold consent to the use of their lands.

³¹On rehearing the Commission refused to change its ruling, but indicated "A different size or location for the reservoir would greatly affect its relationship to the Indian lands, particularly as to the area and location of the land taken. . . . We would then be free to consider whether a taking of Indian lands in the amount of any lesser acreage would be consistent with the purpose of the reservation." (21 FPC at 274; see also, 21 FPC at 175-76 (Hussey, concurring))

³²The Supreme Court held that the land in question was not reservation land. Therefore, section 4(e) findings were not required. The Court then held that the FPA authorized the use of Indian fee lands despite lack of Indian consent. (362 U.S. at 119-22)

found that a project which proposed to flood 22% of a reservation interfered with its purpose).

Here, Project No. 176 occupies only 0.3% of the La Jolla Reservation, 0.7% of the Rincon Reservation, and 2.6% of the San Pasqual Reservation. The affected portions of the first two reservations have extremely rugged terrain "with little or no suitability for other uses." Use of the third reservation will be reduced substantially in the future. (PA 138 n.138) It is no wonder that the Commission, after assessing the Indian rights under MIRA and other relevant statutes (PA 155-68), found that the license as conditioned by it did not interfere with the purposes of these reservations. (PA 174, 176)³³

II.

MIRA SECTION 8 DOES NOT REQUIRE INDIAN CONSENT TO THE USE OF THEIR LANDS FOR FEDERAL POWER PROJECTS.

It is clear that the FPA authorizes the use of all Indian lands, including Mission Indian Reservations, without the consent of the Indians affected. The question remains as to what effect should be given MIRA section 8. There are two options. The two statutes can be harmonized, or the FPA

³³The Commission's approach accords with that of Judge MacKinnon who dissented from the majority's dicta in *Lac Courte Oreilles Band*: "If section 4(e) is given an overly literal interpretation it would prevent the use of any lands in a 'reservation' (including tribal lands) in a power project, if . . . the purpose for which the reservation was created was to 'give sovereignty over tribal lands.' That might be stated to be the broad purpose behind the creation of every Indian reservation. *Thus no reservation lands could even be used in power projects.* Such interpretation, however, would be internally inconsistent with the remainder of the 4(e) provision [footnote deleted], and a number of other provisions in the Act, and the legislative history thereof, which definitely contemplate and provide for incorporating such reservation lands into federal power projects on proper terms. Probably, the congressional intent of 4(e) was to prohibit any use of land within a reservation that would substantially interfere with the purpose for which such reservation was created or acquired. But I would not express any final opinion on this phase of the case." (510 F.2d at 212)

can be found to have impliedly repealed MIRA section 8.

Because in enacting the FPA, Congress expressly rejected the requirement of Indian consent, MIRA can be harmonized with the FPA only by interpreting it as not requiring Indian consent to the licensing of federal power projects. If such consent is required, then the FPA irreconcilably conflicts with section 8 and necessarily repeals it.

A. THE FPA AND MIRA SECTION 8 CAN BE HARMONIZED WITHOUT REQUIRING INDIAN CONSENT.

MIRA can be harmonized with the FPA either by recognizing that MIRA section 8 doesn't require Indian consent to all rights-of-way across Mission Indian Reservations, or by recognizing that the two statutes are independent, alternative methods of obtaining rights-of-way across such reservations.

1. MIRA Section 8 Does Not Require Indian Consent to All Uses of Their Land.

MIRA section 8 was never intended to require Indian consent to the use of Mission Indian land for all purposes or by all persons. On its face, (PA 380) it arguably³⁴ only requires Indian consent for "citizens" and other *private* persons who want "to construct" certain "appliances for the conveyance of water."

Its enactment was in response to the attempts of various private companies and individuals to obtain rights-of-way for canal and railroad purposes across certain Mission Indian Reservations. (See Senate Ex. Doc. No. 118, 51st Cong., 1st Sess. 310 (1890)).

MIRA section 8 never was intended to apply to the federal government or its licensees. (cf. *Federal Power Comm'n v. Tuscarora Indian Nation* (1960) 362 U.S. 99, 119-22 (Court held that 25 U.S.C. §177 was not applicable to the United States or its licensees under the FPA)) In fact, the

³⁴The statute's operative word is "may" not must.

trust patents issued under MIRA to the Rincon, La Jolla and San Pasqual Bands contained the following reservation:

“ . . . there is reserved from the lands hereby held in trust for said [Bands] . . . *a right-of-way thereon for ditches or canals constructed by the authority of the United States.*” (NJA 1036 (La Jolla), 1039 (Rincon) and 1040-41 (San Pasqual))

Thus notwithstanding any consent requirement in MIRA section 8, the government reserved to itself the right to authorize canal right-of-ways across the Mission Indian Reservations without Indian consent.

2. The FPA Is an Alternative to MIRA Section 8 for Obtaining Rights-of-Way Across Mission Indian Reservations.

The Ninth Circuit majority erred when it interpreted MIRA section 8 “as the exclusive means by which a *private* party may obtain a right-of-way across reservations created pursuant to MIRA.” (PA 34) Although in January 1891 Congress may have believed that MIRA was the only method of obtaining a right-of-way across Mission Indian Reservations, certainly it did not intend that it or a future Congress could not also legislate additional methods.

a. Congress Has Enacted Alternative Indian Right-of-Way Acts.

The Ninth Circuit majority implied that to be effective, any legislation subsequent to MIRA must either have specifically mentioned Mission Indian Reservations or expressly repealed MIRA section 8. It ignores the fact that Congress has enacted numerous alternative right-of-way statutes which provide rights-of-way for specific purposes across all Indian lands.

Within three months of MIRA's passage, the first of a series of general statutes was passed authorizing rights-of-way across government lands and reservations. (Act of March 3, 1891, 26 Stat. 1095, 1101, former 43 U.S.C. §946. (Interior authorized to grant canal rights-of-way through

public lands and reservations of the United States))³⁵

The Ninth Circuit's analysis would render a nullity all such Congressional attempts to legislate general right-of-way acts governing Indian lands.

b. Interior Has Not Interpreted MIRA Section 8 as the Exclusive Means of Obtaining Rights-of-Way Across Mission Indian Reservations.

Although the 1894 contract was entered into pursuant to MIRA section 8 (see JA 14-17),³⁶ Interior relied on other statutes as authority for Mutual's 1908 permit and 1914 contract. It never mentioned MIRA section 8 with respect to the original licensing of Project 176 and subsequent amendments.

(1) Interior Granted Mutual Its 1908 Permit Pursuant to the Act of March 3, 1891.

In 1897 the Escondido Irrigational District signed an agreement with the Rincon Band for a canal right-of-way on terms nearly identical to the 1894 contract. (PA 49 n. 16). In 1898 Interior refused to approve the contract because

³⁵Subsequent Federal Acts included: the Act of March 2, 1899, 25 U.S.C. section 312 (rights-of-way for railroads, telegraph and telephone lines through Indian reservations); Act of February 15, 1901, 31 Stat. 790, former 43 U.S.C. section 959 (rights-of-way through public lands, forest, and other reservations of the United States including Indian reservations for generation and distribution of electrical power and for canals, reserves, etc.); Act of March 3, 1901, 25 U.S.C. section 311 (highway rights-of-way through Indian reservations); Act of March 3, 1901, 25 U.S.C. section 319 (rights-of-way for telephone and telegraph lines through Indian reservations); Act of March 11, 1904, 25 U.S.C. section 321 (rights-of-way for oil and gas pipelines through Indian reservations); Act of March 4, 1911, 36 Stat. 1253, former 43 U.S.C. section 961 (rights-of-way for transmission and distribution of power, etc. through public lands and reservations including Indian reservations); see also Act of June 25, 1910, 43 U.S.C. section 48 (reservation of lands within Indian reservations valuable for power or reservoir sites).

³⁶The Irrigation District's first application for a right-of-way across the La Jolla Reservation was under the Act of March 3, 1891. (COR 26569) It was rejected by Interior because it had held in *Florida Mesa Ditch Co.* (1892) 14 Int. Land Dec. 265, that the Act was not applicable to Indian reservations. The District was then instructed by Interior to proceed under MIRA section 8.

it believed it to be detrimental to the Indians. Before the District could satisfy Interior's concerns, Interior notified the District that it could obtain a canal right-of-way under March 3, 1891 Act.³⁷ (COR 15925-32)

On March 25, 1908, Interior granted Mutual, as the District's successor, a permit under the March 1891 Act for its entire ditch line across all government land including the La Jolla, Rincon, and San Pasqual Reservations. (NJA 1399).³⁸

(2) *Interior Relied on Other Rights-of-Way Statutes in Granting Mutual Rights-of-Way in the 1914 Contract.*

In 1914, Interior executed a contract with Mutual which: permitted Mutual to use Rincon and San Pasqual Reservation lands for power generation and transmission purposes; provided the Rincons with power at low fixed rates; and had other provisions relating to water. (JA 22-27)³⁹ In negotiating the contract Interior had indicated that Indian participation was unnecessary and "will tend to delay the matter". (See JA 20) In granting the rights of way for power it apparently relied upon the Act of February 15, 1901, former 43 U.S.C. section 959. (See NJA 1342-44)

(3) *Interior Did Not Refer to MIRA in Regard to the Issuance of the Original License for Project No. 176 and Amendments Thereto.*

In April 1924 Interior, in commenting on Mutual's proposed license, did not mention MIRA section 8 but instead replied that, as long as the license incorporated the 1914

³⁷In *Rio Verde Canal Co.* (1898) 27 Int. Land Dec. 421, Interior overruled *Florida Mesa Ditch*, *supra* and held that the March 3, 1891 Act applied to Indian Reservations. See also *United States v. Portneuf-Marsh Valley Irrigation Co.* (1913 D. Idaho) 205 F. 416, *aff'd* (1914 9th Cir.) 213 F. 601.

³⁸The validity and effect of the 1908 permit are issues in the other Court proceedings, *supra*, n.4.

³⁹The validity and effect of the 1894 and 1914 contracts are issues in the other Court proceedings, *supra*, n.4.

contract, it saw "no reason for objection nor for the imposition of any additional conditions or charges upon the company on account of the occupancy of Indian lands." (NJA 1352)

Over the next fifty years Interior was constantly informed of the project's status, and asked whether additional conditions or annual charges were needed. (See, e.g., NJA 1376, 1385, and 1389) In its replies, Interior never contended that MIRA required the Bands' consent. (See, e.g., NJA 1387, 1388, 1391, and 1393)

(4) *Interior's Consistent Administrative Interpretation Is Entitled to Great Weight.*

From August 1898 until September 1970, Interior consistently indicated that the operative statute(s) governing rights-of-way over the Bands' reservations was not MIRA section 8, but rather the other right-of-way statutes mentioned above, e.g., 43 U.S.C. sections 946 and 959 and the FPA. The Court should give great weight to the consistent construction of a statute by the executive department charged with its administration.⁴⁰

The fact that Interior later changed its mind is not dispositive. (See, e.g., *United States v. Leslie Salt Co.* (1956) 350 U.S. 383, 396 (Court refused to adopt Treasury's new *ad hoc* contentions and instead looked at its prior long-

⁴⁰See, e.g., *California v. United States* (1978) 438 U.S. 645, 659 n. 15 and 676 n. 30 (Congress' intent under the Act of March 3, 1891, is reflected in Interior's contemporaneous administrative decisions and considerable weight must be accorded to interpretations of the Reclamation Act by the agency charged with its operation); *Chemehuevi Tribe v. FPC* (1975) 420 U.S. 395, 409-10 (longstanding consistent uniform construction by the agency charged with administration of the FPA which also involved contemporaneous construction of the Act by officials charged with responsibility of setting its machinery in motion held entitled to great respect and outweighed interests of Indian tribes in having Commission exercise its jurisdiction over thermal energy plants); *Udall v. Tallman* (1965) 380 U.S. 1, 18 (the practical construction given to an Act of Congress by those charged with executing it is entitled to great respect and if acted upon for a number of years will not be disturbed except for cogent reasons).

standing and consistent interpretation); see also *Bryant v. Yellen* (1980) 447 U.S. 352, 377-78 (Court gave apparent weight to Interior's earlier contemporary view that 160-acre limitation was not applicable to certain land.))

For over seventy years, Interior never viewed MIRA section 8 as the exclusive method of obtaining rights-of-way across Mission Indian lands. Instead it gave effect to other Acts, *e.g.*, the FPA, apparently viewing them either as independent, alternative methods of obtaining such rights-of-way, or as superseding MIRA section 8.

c. Courts Have Construed Apparently Conflicting Right-of-Way Statutes as Independent, Alternative Methods for Obtaining Rights-of-Way Across Indian Lands.

Several Courts have addressed the issue of which statute controls when two statutes provide for a right-of-way across Indian land, one requiring Indian or Secretarial consent and the other not. Each has harmonized the statutes by recognizing that each represents an independent, alternative method of obtaining a right-of-way. Each Court also gave effect to a statute permitting a right-of-way without Indian or Secretarial consent, notwithstanding the existence of another statute requiring such consent.

In *United States v. State of Minnesota* (1940 8th Cir.) 113 F.2d 770, the State brought an action under 25 U.S.C. section 357 to condemn an easement for a public highway over allotted Indian lands. The United States contended that 25 U.S.C. section 357, section 3 of the Act of March 3, 1901 (which permits condemnation without Interior's consent), had to be read in *pari materia* with section 4 of the same Act, 25 U.S.C. section 311 (which requires Interior's consent to the opening of public highways through allotted Indian land). The Eighth Circuit rejected that contention:

"The statutes seem definitely to offer two methods of procedure for the acquisition of a right-of-way for public highway [sic]. . . . Thus it was made possible to acquire such a right-of-way by either of two methods,

the Government having consented to each of these methods. So considered, each of these [statutes] is an effective and reasonable provision in the procedure for the acquisition of a right-of-way, neither dependent upon the other." (113 F.2d at 773)

See also *Nicodemus v. Washington Water Power Co.* (1959 9th Cir.) 264 F.2d 614, 618 (The Court held that an easement could be obtained pursuant to section 357 notwithstanding the fact that unlike section 323, it did not require either the Indians' or Interior's consent).⁴¹

Accord *Nebraska Pub. Power Dist. v. 100.95 Acres of Land*, No. 82-2042, slip op. (8th Cir. October 28, 1983); *Yellowfish v. City of Stillwater* (1982 10th Cir.) 691 F.2d 926, 929-30, cert. denied (1983) — U.S. —, 77 L.Ed.2d 298; *Southern California Edison Co. v. Rice* (1982 9th Cir.) 685 F.2d 354, 357; *Transok Pipeline Co. v. Darks* (1977 10th Cir.) 565 F.2d 1150, 1153, cert. denied (1978) 435 U.S. 1006.

Here, Congress provided two independent methods of obtaining rights-of-way across Mission Indian reservations. In enacting MIRA section 8 Congress had in mind the needs of an irrigation company that wanted to build a canal on Mission Indian land. In enacting the FPA a more recent Congress envisioned a scheme for the comprehensive development of the nation's water power. With this purpose in mind it provided for the use of Indian lands for all purposes necessary for power development, including rights-of-way not only for water conveyance facilities but also for

⁴¹The Court also rejected the argument that "section 357, . . . being a general statute, should not be construed in derogation of Indian treaty rights or the rights of Indians. . . ." (*Id.* at 617) The Court stated: "In our view, the test is the manifested intention of Congress, and not whether the statute be general or special." (*Ibid.*); see also *Rice v. Rehner* (1983) — U.S. —, 77 L.Ed.2d 961, 978 (In refusing to apply the canon of construction which provides that state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided, the Court stated: "We have consistently refused to apply such a canon of construction when application would be tantamount to a formalistic disregard of congressional intent.")

transmission lines and reservoir and power plant sites.

Project No. 176 is a licensed federal power project. It is not the primitive irrigation project that Congress had in mind when it drafted MIRA. Under the circumstances the FPA should be viewed as the appropriate method of obtaining rights-of-way across Mission Indian reservations for this Project.

B. TO THE EXTENT THAT MIRA SECTION 8 REQUIRED INDIAN CONSENT TO POWER PROJECT RIGHTS-OF-WAY ACROSS MISSION INDIAN RESERVATIONS, IT WAS REPEALED BY THE FPA.

Assuming arguendo that MIRA Section 8 requires Indian consent to federal power project rights-of-way across Mission Indian reservations, Petitioners submit: (1) the FPA and MIRA irreconcilably conflict because in enacting the FPA, Congress expressly rejected any requirement of Indian consent to the use of their lands; and (2) the FPA was a comprehensive act which was intended to supplant the prior patchwork collection of primitive, restrictive statutes such as MIRA which had hindered development of the nation's hydro-power.⁴²

1. The FPA Impliedly Repeals MIRA Section 8 Because It Irreconcilably Conflicts With It.

a. Congress Intended to Repeal All Acts Inconsistent With the FPA.

FPA section 29 contains an express general repealing clause which provides: "All Acts or parts of Acts inconsistent with this Act are hereby repealed." (PA 388) (See *United States v. Southern Power Co.* (1929 4th Cir.) 31

⁴²In *Posadas v. National City Bank* (1935) 296 U.S. 497, 503, the Court stated: "There are two well-settled categories of repeal by implication — (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act."

F.2d 852, 858 (Interior's power to grant rights-of-way across forest lands pursuant to the Act of February 15, 1901 was repealed by section 29)); *Assignment of Hydroelectric Power Permits Affecting National Forest Lands* (1921) 32 Op. U.S. Atty. Gen. 525, 528 (Secretary of Agriculture's authority to approve the transfer of preexisting permits under Act of February 15, 1901 was terminated by the passage of the FPA); see also *Scenic Hudson Preservation Conf. v. Calhoun* (1973 S.D.N.Y.) 370 F.Supp. 162, 165-67, *aff'd* (1974 2d Cir.) 499 F.2d 127 (Court held that although the FPA was not literally inconsistent with Rivers and Harbors Act, section 10, the legislative history clearly indicated that Congress intended to do away with piecemeal licensing of hydroelectric plants and that duplicative licensing violated the spirit if not the words of the Act.))

b. The FPA Irreconcilably Conflicts With Any Consent Requirement of MIRA Section 8.

Congress expressly rejected any requirement of Indian consent when it enacted the FPA. Its rationale was two-fold:

(1) It did not want to give Indians the power to arbitrarily veto a power project that was in the greater public interest; and

(2) It was satisfied that any legitimate Indian rights were adequately protected by other sections of the FPA.

Against this backdrop, it is difficult to conceive of a more fundamental conflict than the Ninth Circuit majority's imposition of MIRA's Indian consent requirement on the FPA. That holding gives the Bands a veto over Project No. 176. This Court has, in analogous situations, consistently refused to give States a similar veto over the licensing of a federal power project.

In *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n* (1946) 328 U.S. 152, the Court rejected a State's claim that a license applicant had to comply with both the

FPA and a State permit requirement:

“To require the petitioner to secure a state permit . . . as a condition precedent to securing a federal license . . . would vest in the [State] a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the federal Act. It would subordinate to the control of the state the ‘comprehensive planning’ which the Act provides shall depend upon the judgment of the Federal Power Commission.” (328 U.S. at 164)

“A dual final authority with a duplicate system of state permits and federal licenses required for each project, would be *unworkable*.” (*Id.* at 168)

Accord Federal Power Comm’n v. State of Oregon (1955) 349 U.S. 435, 445.

Contrary to this Court’s rulings the Ninth Circuit gives a small California Indian band a veto which even the State of California does not have.

2. The FPA Impliedly Repeals MIRA Section 8 by Totally Occupying the Field of Water Power Development on Federal Lands.

In *Utah Power & Light Co. v. United States* (1917) 243 U.S. 389, the Court compared two early statutes that provided for rights-of-way over public lands for ditches, canals and reservoirs (Revised Statutes sections 2339 and 2340) with a later act (Act of May 14, 1896, 29 Stat. 120) “which related exclusively to rights-of-way for electric power purposes. . . .” (243 U.S. at 406) The Court noted that the earlier acts “did not cover powerhouses, transmission lines or the necessary subsidiary structures” needed for a water power plant. (*Ibid.*) The Court held that the early acts thus were superseded by the later act because “[i]t dealt specifically with that subject [water power development], covered it fully, embodied some new provisions and evidently was designed to be complete in itself.” (*Ibid.*)

The situation in this case is analogous. MIRA section 8 was an early attempt by Congress to allow the beneficial use of the Mission Indian reservations by permitting rights-of-way across them for certain purposes. "A farther-sighted Congress subsequently enacted the FPA." (PA 34-35) Its language, its legislative history, and this Court's interpretation of it, confirm that it was intended to be a comprehensive scheme for water power development, which superseded the numerous, restrictive, piecemeal acts preceding it.

a. On Its Face the FPA Evinces a Comprehensive Scheme for the Development of Water Power.

MIRA section 8 provides a method for obtaining rights-of-way only for certain "appliances for the conveyance of water. . . ." (PA 380) In contrast FPA section 4(e) empowers the Commission to issue licenses "for the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines or other project works necessary or convenient for . . . the development, transmission, and utilization of power across . . . or upon any part of the public lands and reservations of the United States. . . ." (PA 381)

For purposes of operating a power project on Mission Indian lands, MIRA section 8 is inadequate and necessarily was superseded by the FPA's later, more comprehensive scheme.

b. The FPA's Legislative History Demonstrates That Congress Intended It to Supplant Earlier Legislation.

The FPA was enacted in response to the widespread dissatisfaction of the power industry and the public with existing statutes relating to the use of federal lands. Some did not provide for adequate rights-of-way. Others only provided revocable permits or required a special act of Congress before any particular project could be built. Under the circumstances the power industry was unwilling to hazard the

necessary large investment in a power project which might be stalled by Congress or have its permit revoked.⁴³

The FPA addresses each of those Congressional concerns. It provides for all necessary rights-of-way across all public lands and reservations. Its provisions for an initial 50-year term and possible relicensing thereafter removed many of the risks perceived by investors.

To the extent that MIRA section 8 can be construed as providing rights-of-way for water power projects, it clearly was superseded by the more comprehensive FPA.⁴⁴

III.

THE COMMISSION MAY REJECT UNREASONABLE SECRETARIAL CONDITIONS.

The mandatory inclusion of Interior's conditions, without regard to their reasonableness, usurps the Commission's licensing authority. It fails to give effect to the Act as a whole; ignores contrary legislative intent; and, is inconsistent with longstanding administrative interpretation.

⁴³The Senate Report accompanying S. 1419 highlighted some of these concerns. (S.Rep. No. 179, 65th Cong., 2d Sess. 2 (1917)).

In House hearings, Secretary of Interior Lane voiced similar concerns: "We had a statute, and have still, under which we grant revocable permits. The men who have money to invest in water-power propositions are not willing to invest them upon the hazard of the digestion of the Secretary of the Interior. They are not willing to allow any official to say when the investment they have made shall be thrown to the winds. The result has been we have stood for five years, and for a great deal longer, but for the five years of which I know, almost entirely without development of one of our great resources." (Hearings before House Water Power Committee, 65th Cong., 2d Sess. 446 (1918)); see also Pinchot, *The Long Struggle for Effective Water Power Legislation* (1945) 14 Geo. Wash. L. Rev. 9.

⁴⁴Interior once agreed. (See "The Federal Water Power Act" (1920) 47 Int. Land Dec. 556, 557 (FPA provides "a complete and exclusive method for the use of public lands, reservations and navigable waters for the development, transmission, and utilization of hydroelectric power"))

A. WHEN READ AS A WHOLE, THE FPA EVINCES CONGRESS' INTENT THAT THE COMMISSION HAVE THE FINAL AUTHORITY TO MOLD A PROPOSED PROJECT INTO ONE BEST ADAPTED TO THE PUBLIC BENEFIT.

The holding that section 4(e) mandates the inclusion of Interior's conditions, without modification, ignores the meaning of the Act as a whole. Congress' overriding purpose in enacting the FPA was to replace earlier "piecemeal, restrictive [and] negative . . . federal laws" (*First Iowa*, *supra*, 328 U.S. at 180) with "a complete and comprehensive plan for the development . . . of electric power . . . upon the public lands and reservations of the United States. . . ." (*Tuscarora*, *supra*, 362 U.S. at 118)

The Act does permit individual secretaries whose reservations are used by a project to input their parochial concerns by recommending the insertion of conditions in a license to protect their reservations; however, it is the Commission that is charged with implementing the FPA's overall goal.

Under section 4(e), the *Commission* makes the final determination whether a license will "interfere or be inconsistent with the purpose for which [a] reservation was created or acquired." (PA 381) The *Commission* is charged under section 10(a) with exercising the final judgment "[t]hat the project adopted . . . will be best adapted to a comprehensive plan . . . for the improvement and utilization of water-power development, and for other beneficial public uses" (PA 382)

The Ninth Circuit overlooked section 6 which allows licenses to "be altered . . . upon the mutual agreement of the licensee and the *Commission*", and section 10(a) which gives the *Commission* "authority to require the modification of any project and of the plans and specifications of the project works before approval." (PA 382) Neither section

requires the concurrence of a secretary.⁴⁵

Congress cannot be presumed to have written departmental vetoes into one section only to nullify them elsewhere. (See, e.g., *American Textile Manufacturers Inst. v. Donovan* (1981) 452 U.S. 491, 513 ("we should not 'impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.'"))

B. THE FPA'S LEGISLATIVE HISTORY SUPPORTS THE COMMISSION'S INDEPENDENCE.

The Commission always has been the single agency responsible for national water power development. Although it initially was composed of three Secretaries (War, Agriculture and Interior), it later was reorganized as a five-person body, independent from the Secretaries, with its own staff. The FPA's legislative history and its amendments show that Congress never intended that one Secretary, either sitting as a member of the original Commission or later as a non-member, could veto a licensing decision. (See, e.g., remarks of Secretary of Agriculture Houston rejecting the notion that a particular secretary could veto a licensing decision, where a project's overall benefit to the public outweighed any perceived detriment to that Secretary's departmental interests ("Water Power", Hearings before the House Committee on Water Power, 65th Cong., 2d Sess. 678 (1918))

⁴⁵The Court also overlooked section 10(i) which permits the Commission in issuing licenses for a minor project, to "waive such conditions, provisions and requirements of this part [except the 50-year license term and annual charges for the use of Indian land] . . . as it may deem to be to the public interest . . ." (PA 384) Thus, under the Ninth Circuit's holding, the Commission and the licensee are bound to accept departmental conditions, which they may later negate or waive without departmental approval.

Project No. 176 is a minor project (PA 69 n. 49) and the Commission expressly waived certain minor conditions. (PA 221-23) Although the Commission understood that it also had the power to "invoke section 10(i) to waive section 4(e)," it chose not to (PA 137), and instead modified Interior's conditions or rejected them as it deemed in the public interest. (PA 143-55)

It was known that conflicts would arise, but as Secretary Houston stated:

"All such differences can easily be adjusted by [the] commission, or board. . . . They can define their policies and *adjust such differences in their regular or called meetings.*" (*Id.* at 677)

It is just not sensible, when looking at the whole scheme — to create a *Commission* of three to coordinate national water power development — to believe that Congress, either intentionally or by inept language, chose to give one member of the Commission a veto.⁴⁶ Coordinated action would thus be frustrated by singular action.

Prior to 1920, each Secretary had autonomy; after 1920, each Secretary had one vote, but the Commission had the ultimate authority to decide.

By 1930 the Commission workload had so increased that it was deemed desirable to have a full-time Commission, independent from the Secretaries, and with its own staff. The bill to restructure the Commission became law without any amendment to what is now section 4(e); however, during hearings on the bill, Congress' intent that the Commission have the final licensing decision became manifest. (See Hearings on H.R. 11408 Before the House Committee on Interstate and Foreign Commerce, 71st Cong., 2d Sess. 32,

⁴⁶Although in opposing the Indian consent amendment (discussed *supra*, at 14-16) Senator Walsh did argue that it was unnecessary because Interior could "veto" the use of reservation land (see 59 Cong. Rec. 1564, 1568 (1920)), Senator Meyers placed these comments in perspective when he stated:

"It is Interior's sworn duty to seek the views of the Indians and to consider them and to give them great weight and to take the views of the Indians into consideration in determining a matter affecting their welfare, *along with all other factors that are entitled to consideration.*

[I]f he thinks an application for a permit which affects land owned by Indians is not fair and right and reasonable I have no doubt he will resist it; *and if he thinks it intended for a use to which the public is entitled, I have no doubt that any Secretary of the Interior would consent that it be granted only upon the*

48-49 (1930) (remarks of Secretaries Wilbur and Hyde))

In Senate hearings, the Commission's chief counsel, James Lawson, made clear the Commission's independence:

"The pending bill (S.3619) provides for an independent commission and, in my judgment, that plan should not be departed from. The proposal to create a commission composed of Undersecretaries of the three departments would leave us with a commission subject to political control and would not be compatible with the public interest to be served.

...

If the decisions of the commission are to be made by order of, or subject to review by the heads of the departments, you will have complicated and not simplified the administration of this important statute.

...

The commission now has power to override the head of a department as to the consistency of a license with the purpose of any reservation. Power sites are also reservations. I would be unable to follow the logic which made the protection of a thousand dollars worth of timber land of more importance than the proper utilization of a hundred thousand dollar power site."

(Hearings Pursuant to S. Res. 80 and on S. 3619 Before the Senate Comm. on Interstate Commerce, 71st Cong., 2d Sess. 358 (1930))

Congress could not have intended that by using the word "shall" that the Commission had to accept a Secretarial condition that would prevent the licensing of a valuable project. More likely, in light of the fact that the Commission originally was composed of the three Secretaries, Congress believed that they would coordinate their activities while according a particular Secretary a reasonable amount of comity where a project primarily impacted on a reservation within his jurisdiction. Where a Secretary proposed a "reasonable" condition that would protect his interests without thwarting the Commission's overall goal of water-power

development, Congress probably did believe that such a condition "shall" be included. It is certain, however, that Congress did not intend that narrow departmental interests predominate over the broad public interests in a licensing decision.

C. THE COMMISSION CONSISTENTLY HAS INTERPRETED THE FPA AS MANDATING THE INCLUSION OF ONLY THOSE SECRETARIAL CONDITIONS IT DEEMS REASONABLE.

The Commission always has interpreted section 4(e) to require only those conditions which it deems reasonable and in the public interest. In *Pigeon River Lumber Co.* (1935) 1 FPC 206, The Commission rejected Interior's contention that the issuance of a preliminary permit would be a futile act "because of the conditions which the Secretary would feel impelled to include in the license for the protection of the Indians." (*Id.* at 209)

However, the Commission indicated that in making its section 4(d) [now 4(e)] findings it would "give great weight to the judgment and recommendation of the custodian of the rights and welfare of the Indians." (*Ibid.*)⁴⁷

⁴⁷See also *Pacific Gas & Electric Co., Project 1962* (1947) 6 FPC 729, 730 (Commission rejected conditions "recommended" by Agriculture for the protection of fish); *Southern California Edison Co., Project 1930* (1949) 8 FPC 364, 367-68 (Commission rejected condition recommended by Agriculture to require a minimum water flow); *Arizona Power Auth'y* (1968) 39 FPC 955, 960 (Commission rejected condition that would have required secretarial approval of changes in annual charges or use of Indian water); *Pacific Gas and Electric Co.* (1975) 53 FPC 523, 526 (Commission refused to include conditions proposed by Secretary of Agriculture in relicensing decision); *Montana Power Co., Project No. 2301* (1976) 56 FPC 2008, 2011-12 (Commission rejected condition requested by Agriculture that a license term be limited to twenty years); *Northern States Power Co., Project No. 108* (1980) 13 FERC ¶61,055 at 61,114. "[A] new license may be issued without the Band's consent, and without including conditions recommended by Interior."

The Commission also has denied Interior a veto over the fixing of annual charges for the use of Indian lands under section 10(e). (See, e.g., *Montana Power Co. v. Federal Power Comm'n* (1971 D.C. Cir.) 459 F.2d 863, 874, cert. denied (1972) 408 U.S. 930)

Courts have implicitly recognized this longstanding practice by referring to proposed secretarial conditions under section 4(e) in terms of "recommendations" (see, e.g., *Idaho Power Co. v. Federal Power Comm'n* (1965 9th Cir.) 346 F.2d 956, 958, *cert. denied* (1965) 382 U.S. 957), and "suggestions." (See, e.g., *Federal Power Comm'n v. Idaho Power Co.* (1952) 344 U.S. 17, 19, *reh'g denied* (1952) 344 U.S. 910)

The Commission's consistent and reasonable interpretation of its own Act is entitled to great deference. (See, e.g., *American Paper Inst., Inc. v. American Electric Power Service Corp.* (1983) — U.S. —, 76 L.Ed.2d 22, 38-39)

D. THE REASONABLENESS OF ANY SECTION 4(e) CONDITIONS MUST BE DETERMINED BY THE COMMISSION.

All parties agree that the conditions to be included in the license must be "reasonable." The Ninth Circuit in denying that its holding would give Interior an unconditional veto, stated that any "conditions propounded by Interior will be subject to judicial review . . ." (PA 24)

The Court thus contradicted its own premise that section 4(e)'s plain language mandates the inclusion of all conditions in a license. If, in fact, section 4(e) mandates only the inclusion of "reasonable" conditions, then the real issue is who makes the initial determination of reasonableness — the Commission or the appellate court.⁴⁸

Common sense dictates that the Commission make the initial determination whether a secretarial condition should

⁴⁸Humpty Dumpty's observation could not be more apt:

"When I use a word," Humpty Dumpty said, rather a scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that's all."

L. Carroll, *Through the Looking-Glass*, ch. 6 quoted in J. Bartlett, *Familiar Quotations* 746 (14th ed. 1968).

be included. As Judge Anderson noted:

"I would place the initial reasonableness decision on FERC, for it is, after all, the forum in which the initial factfinding function is vested. [citation omitted.] FERC's written findings of fact and supporting reasoning would then be subject to review in the court of appeals. I believe this procedure would preserve the control of FERC over licensing, and at the same time respect the Secretary's statutory duty to protect the reservations." (PA 41)

E. THE COMMISSION LACKS AUTHORITY TO INCLUDE INTERIOR'S CONDITIONS WITHOUT MODIFICATION.

The Bands' major purpose in this proceeding was to obtain a license to operate Project No. 176 as a nonpower project under section 15. The Bands' proposal was inferior to Petitioners' in many respects (see PA 92-109); however, one of the primary problems was the Bands' inability to establish adequate water rights to operate the project. (See PA 98-109)

Interior's conditions were designed to force Petitioners to: (1) provide the Bands with the very water rights to which they could not establish title; and (2) operate the project for the Bands' benefit under essentially the same nonpower regime as that proposed by the Bands. What the Bands were unable to obtain by merit, Interior attempted to obtain for them by arbitrary fiat, using the proviso of section 4(e) as a subterfuge.

The Commission lacked authority to insert Interior's conditions because their inclusion would have violated: (1) section 27 which prohibits the Commission from adjudicating water rights; and (2) the Commission's duty under section 10(a) to adopt the project that was in the public's best interest.

1. Interior's Conditions Are an Impermissible Attempt to Adjudicate Water Rights Within a Commission Proceeding.

Section 27⁴⁹ bars the Commission from adjudicating water rights. (See, *e.g.*, *First Iowa, supra*, 328 U.S. at 178) Notwithstanding its bar, the Bands and Interior attempted to use Interior's section 4(e) conditions to obtain the water rights which are being litigated in federal district court.

The Bands admitted that they needed Petitioners' water rights and, particularly Henshaw's storage, in order to operate their proposed nonpower regime. (See remarks of Bands' hydrology expert, Mr. Stetson (COR 7816-17), and staff counsel Mr. Woods. (*Id.* at 7818))

When Vista's attorney, Mr. Wright, observed that Interior's conditions would give the Bands the entire natural flow in the river (JA 165-68), Mr. Chambers, Interior's spokesman, did not dispute the observation, but instead attempted to justify the result. (JA 168-71)

Interior contended that even if Mutual's and Vista's water rights were adjudicated to be superior to those of the Bands, it could nonetheless unilaterally impose conditions on the renewal of the license which would take those water rights and give them to the Bands — conditions which would in effect reverse the water rights adjudication of the District Court. (See remarks of Chambers, JA 176) Interior reaffirmed its position in its revised conditions. (JA 238-42) In its accompanying letter (JA 218-37) Interior stated:

“Even if the water belongs to Mutual (and Vista), the Department and the Commission may impose conditions that derogate from and infringe upon their rights

⁴⁹Section 27 (PA 387-88) provides:

“Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.”

in return for the privilege of utilizing Indian and public lands.” (JA 225)

The Commission understood Interior’s purpose:

“Although the Bands and Interior expressly ‘acknowledge that the Commission is without jurisdiction to adjudicate the merits of the existing water rights controversy between the Bands and Mutual and Vista’, nonetheless, they seem to say indirectly that the Commission is bound to do so. . . . (PA 105-06)

. . .

We find that many of the arguments are directed toward imposing license conditions for providing water to the Bands. . . . (*Id.* at 106 n.101)

. . .

The Commission was not intended to be, and is not, a forum for litigating disputed water rights.” (*Id.* at 108)

2. The Inclusion of Interior’s Conditions Would Contravene the Commission’s Duty Under Section 10(a).

Section 10(a) requires the Commission to adopt the project which in its judgment “is best adapted to a comprehensive plan . . . for the improvement and utilization of waterpower development, and for other beneficial public purposes. . . .” (PA 382) After comparing the competing proposals presented by the Bands and Petitioners, the Commission concluded that Petitioners’ project was “best adapted” within the meaning of section 10(a). (PA 119 (“Our decision is premised upon superiority under sections 10(a) and 7(a) of the joint Mutual Escondido application.”))

Notwithstanding the superiority of Petitioners’ proposal, Interior determined that it could impose conditions in the license that would force it to be operated in a manner similar to the Bands’ proposal. In effect, Interior proposed to usurp the Commission’s authority under section 10(a) and substitute its own judgment as to the relative merits of the

competing license applications.⁵⁰

The Commission understood the purpose behind Interior's conditions:

"If the Commission were required to include those conditions in the license issued herein, it would be unable to exercise its judgment and authority under section 10(a) to reshape Mutual's and Escondido's joint licensing proposal into the project which is best adapted to a comprehensive plan for beneficial public uses." (PA 147)

F. IN ANY EVENT THE FPA DOES NOT REQUIRE THE IMPOSITION OF SECRETARIAL CONDITIONS IN A RELICENSING SITUATION.

Even if the Ninth Circuit were correct in its interpretation of section 4(e), the inclusion of secretarial conditions in this case would not be mandatory because this was a relicensing

⁵⁰As the ALJ noted:

"It is manifest the conditions were designed not to improve the project but to destroy it. The joint brief at page 63 seems to confess as much, saying their net effect is to 'resemble the operations under the nonpower license or recapture alternative, for that is the only way to assure the adequate protection and utilization of the reservation.'

If that sort of approach is what the conditioning requirement of section 4 contemplates, i.e., a Secretarial veto, made confessedly with total disdain for the survival of the project itself and for the law's standard of comprehensive development, then this six-year proceeding has been an expensive waste of time; no room remains for the Commission's judgment; and, if it were to become the custom in other cases, the hydro power potentialities of the nation's many reservations cannot contribute to the national need, nor can their avails be realized for the Indians' benefits. The result can only be to nullify the project and deprive the Bands of a very valuable and profitable resource." (JA 300-01)

The proposed conditions had been prepared in concert by the Bands and Interior. (NJA 4366-67) Since they argued that Interior had an absolute right to impose the conditions (NJA 4356), the ALJ was also concerned that:

"[T]he judge of this case, the decider of this case, is one of the litigants, the Secretary. . . . How can the parties on both sides feel they are fairly treated when it turns out that the judge is the opposition party? That part worries me, and I can't quite see the answer." (NJA 4364)

proceeding under section 15 — not section 4(e).⁵¹

The FPA establishes two separate licensing schemes: a procedure for issuing an original license under section 4(e); and a procedure under section 15 for issuing a new license after an original license expires. (See *Pacific Gas & Electric Co.* (1975) 53 FPC 523, 526 ("New licenses are issued under section 15 rather than section 4(e)."))

The Ninth Circuit totally ignored section 15. Although issuance of an original license under section 4(e) permits affected Secretaries to propose conditions for insertion in the license, section 15 makes no such requirement with respect to the issuance of any new license. The FPA's legislative history gives no indication that section 4(e)'s conditions proviso applies on relicensing under section 15. (See *Harrison v. PPG Ind., Inc.* (1980) 446 U.S. 578, 592 ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."))

A common sense reading of the ~~Act~~ compels the conclusion that the findings and conditions in section 4(e) were to be a one-time requirement upon issuance of an original license.

The reason Congress did not require section 15(a) licenses to meet section 4(e) requirements is obvious when one considers the practical distinctions between the two situations.

⁵¹Petitioners disagree that the action "is partly an initial licensing of the Henshaw facilities and partly a relicensing of the presently licensed Project No. 176 facilities." (PA 136) With the exception of minor acreage under separate permit from Forestry (PA 58), no additional public lands or reservations are involved as all Henshaw lands are owned by Vista.

Commission proceedings were always treated as a relicensing. Since 1974 Mutual has operated the project with annual licenses issued under section 15(a). (See 51 FPC 1610 (1974)) The Commission rejected Interior's take-over recommendation under section 14 (PA 109-16), and on rehearing determined net investment and severance damages. (PA 312-27) The "new" (not "initial") license issued to Petitioners was "for the continued operation and maintenance of Escondido Project 176." (PA 253)

When an applicant applies for an original license, there has not been a substantial financial investment and no consumer reliance on the project has developed. At that stage, if the Commission seeks to impose onerous conditions, the applicant can reject them and if the proposal interferes with a particular reservation, the project will not move forward. The situation on relicensing is quite different. In such a case, there already has been a finding that the project will not interfere with the reservation in question; the applicant has accepted the proposed conditions and built the project; the public has become dependent on its benefits' and the only real question is who should operate the project, the existing licensee, the United States or a competing applicant. Since this is a relicensing case under section 15(a), a Secretarial veto is inapplicable.

IV.

THE NINTH CIRCUIT'S HOLDING THAT "WATER RIGHTS" ARE A "RESERVATION" FOR SECTION 4(e) PURPOSES IS A STRAINED AND UNNECESSARY INTERPRETATION THAT JEOPARDIZES ALL FEDERAL POWER PROJECTS.

The Ninth Circuit held that Interior's conditions also must be imposed with respect to the Indian reservations which "may be affected by the project." (PA 25)

Its strained interpretation of "reservation" conflicts with both the clear language of the statute and longstanding Commission interpretation. It is unnecessary because Indian water rights are fully protected in other ways.

A. THE NINTH CIRCUIT'S INTERPRETATION IS INCONSISTENT WITH BOTH THE STATUTORY LANGUAGE AND THE COMMISSION'S LONGSTANDING INTERPRETATION OF IT.

Section 4(e) authorizes the construction of power projects "upon . . . reservations of the United States" and states that "licenses shall be issued *within* any reservation." (PA

381) Section 3(2) defines "reservations" to include "tribal lands embraced *within* Indian reservations." (PA 380)

The Court conceded "that the word 'within' tends to paint a geographical picture in the mind of the reader." (PA 26) Certainly if Congress had intended the result that the Court strained to reach, it simply would have added the words "or affecting" following the word "within".

The Commission always has limited application of section 4(e) to projects "within" the physical boundaries of a reservation. (See, e.g., *Pigeon River Lumber Co.* (1935) 1 FPC 206, 207 (dams outside of Indian reservation did not affect government lands); *City of Seattle, Department of Lighting, Project No. 533* (1977) 59 FPC 196, 12 FPS 5-514, 531 (tribal fishing rights not a "reservation."))⁵²

Recognizing the awkwardness of its interpretation, the Court purported to find "a possible ambiguity" in the statute that should be "resolved" in favor of the Indians. (PA 27) Its interpretation extends the FPA far beyond Congressional intent (see, e.g., *NAACP v. FPC* (1976) 425 U.S. 662), and ignores the Commission's longstanding interpretation. It also ignores the rule that statutes are not construed in favor of the Indians where intended to achieve other purposes and do not require Indian consent. (See *United States v. First National Bank* (1914) 234 U.S. 245, 259)⁵³

⁵²The Court's definition of "reservation" also conflicts with *Tuscarora*, *supra*, where the Court stated that Congress:

" '[F]or purposes of this Act' " (§3(2)), intended to and did confine "reservations", including "tribal lands embraced within Indian reservations" (§3(2)), to those located on lands "owned by the United States" (§3(2)), or in which it owns a proprietary interest." (362 U.S. at 114)

Clearly the lands in question in *Tuscarora* would have been "affected" by the Project; nevertheless they were not within the definition of "reservation" because they were owned "in fee" and not by the United States.

⁵³See also *De Coteau v. District County Court* (1975) 420 U.S. 425, 447 ("A canon of construction [requiring resolution of ambiguities in favor of Indians] is not a license to disregard clear expressions of . . . congressional intent.")

B. IT WAS UNNECESSARY FOR THE NINTH CIRCUIT TO DISTORT THE MEANING OF THE FPA IN ORDER TO PROTECT INDIAN WATER RIGHTS.

The Court worried that a project could turn "a potentially useful reservation into a barren waste without even crossing it in a geographical sense . . . [and would] not attribute to Congress . . . [such a] perverse and illogical intention. . . ." (PA 28) This concern is wholly unjustified. For a project to have such dire consequences, the Commission would have to ignore the project's harmful effects³⁴ and the Courts would have to refuse to protect Indian water rights.³⁵ Nothing in the history of this or any other federal water power project warrants such speculation.

The Commission cannot adjudicate water rights (see discussion, *supra*, at 40-41); protection of the right to "an allotment of water necessary to make the reservation livable," is a judicial function. (*State of Arizona v. State of California* (1983) — U.S. —, 75 L.Ed.2d 318, 331 (quoting from *State of Arizona v. State of California* (1963) 373 U.S. 546, 599-600); see also *Winters v. United States* (1908) 207 U.S. 564.)

Conclusion.

The Ninth Circuit's section 4(e) and MIRA section 8 holdings give the Bands and Interior a veto over the relicensing of Project No. 176 — a project that has served Escondido and its surrounding communities for over sixty years. Moreover, its sweeping definition of the word "reservation" makes most federal hydro-electric projects subject to an Indian or Secretarial veto.

³⁴The Commission did not ignore the Pala, Pauma and Yuima Reservations. It required the licensees to fulfill all valid contracts to supply electric power and water to them. (PA 219-21) The Commission also indicated that it might impose additional requirements consistent with the final disposition of the district court litigation. (PA 334; see also PA 190)

³⁵As discussed *supra*, note 4, the water rights of all the parties are being adjudicated in the federal courts. See also PA 366 n.51.

As a result the Ninth Circuit decision may well destroy Project 176 — a project which the Commission found “best adapted to a comprehensive plan for public users. . . .” (PA 130) and more importantly, cripple all future hydro-electric development in the West.⁵⁶

The Court should reverse and rule: (1) MIRA section 8 does not require the Bands’ consent to the use of their lands for Project 176; (2) FPA section 4(e) requires the Commission to include only these secretarial conditions that it deems reasonable; and, (3) the Pauma and Pala reservations, including the Yuima tracts, are not “reservations” under section 4(e).

Dated: December 15, 1983.

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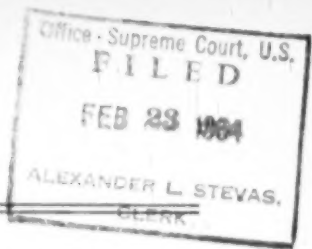
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⁵⁶As pointed out in Petitioners’ Reply Brief (PRB) on Petition for Writ of Certiorari (PRB 2-6), as many as 150 projects are located on Indian reservations or alleged to adversely affect their water and fishing rights. Further, 606 projects utilize federal lands and reservations. (Pet. 7 n.12; see also PRB 5 n.6) Each project could be frustrated either by an Indian veto, based for example on alleged treaty fishing rights, or by a departmental head whose narrow view of the public interest might be limited to timber management or white water rafting.

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No. 82-2056



In The
Supreme Court of the United States
October Term, 1983

— o —
ESCONDIDO MUTUAL WATER CO., et al.,
Petitioners,

vs.

LA JOLLA BAND OF MISSION INDIANS, et al.,
Respondents.

— o —
On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit

— o —
**BRIEF OF RESPONDENTS LA JOLLA, RINCON,
SAN PASQUAL, PAUMA AND PALA BAND
OF MISSION INDIANS**

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QUESTIONS PRESENTED

1. Whether, in issuing a license for a hydroelectric project that utilizes reservation lands pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), the Federal Energy Regulatory Commission may modify or reject license conditions deemed "necessary for the adequate protection and utilization" of the reservation by the Secretary with supervisory authority over the reservation.

2. Whether Indian water rights are "reservations" within the meaning of Section 3(2) of the Federal Power Act, 16 U.S.C. §796(2) and if so, whether reservations situated directly downstream from a hydroelectric project whose reserved water rights will be affected by the project qualify for the protections afforded reservations under Section 4(e) of the Federal Power Act.

3. Whether Section 8 of the Mission Indian Relief Act, 26 Stat. 712, 714, considered in conjunction with Section 4(e) of the Federal Power Act, requires a Commission licensee, whose project is designed primarily to convey water across Mission Indian reservation lands, to obtain rights-of-way from the Mission Bands whose reservations are traversed by the water conveyance facilities.

TABLE OF CONTENTS

	Pages
Questions Presented	i
Table of Authorities	iii
Statutes Involved	1
Statement of the Case	1
Introduction and Summary of Argument	2
Argument:	
I. THE MISSION INDIAN RELIEF ACT AND THE FEDERAL POWER ACT WERE DESIGNED TO PROTECT AND BENEFIT INDIAN RESERVATIONS.	6
A. The Mission Indian Relief Act.	6
B. Section 8 of the Mission Indian Relief Act.	10
C. The Federal Power Act.	14
II. THE SECRETARY'S SECTION 4(e) CONDITIONS ARE MANDATORY.	19
III. THE WATER RIGHTS OF THE DOWNSTREAM RESERVATIONS QUALIFY FOR THE PROTECTION AFFORDED BY THE RESERVATION PROVISIO.	27
IV. LICENSING THE USE OF TRIBAL LANDS FOR CANAL RIGHTS OF WAY REQUIRES THE BANDS' CONSENT.	34
Conclusion	47

TABLE OF AUTHORITIES

CASES:

<i>Andrus v. Glover Construction Co.</i> , 446 U.S. 608 (1980)	21
<i>Arizona Power Authority</i> , 39 FPC 955 (1968)	40
<i>Bowman v. Texas Educational Foundation</i> , 454 F. 2d 1097 (5th Cir. 1972)	46

TABLE OF AUTHORITIES—Continued

	Pages
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976) _____	22, 44, 45, 46
<i>Bryant v. Yellen</i> , 447 U.S. 352 (1980) _____	43
<i>Cappaert v. United States</i> , 426 U.S. 128 (1976) _____	31, 33
<i>Chemehuevi Tribe of Indians v. FPC</i> , 420 U.S. 395 _____	45
<i>Chemehuevi Tribe of Indians v. FPC</i> , 489 F.2d 1207 (D.C. Cir. 1973), <i>reversed on other grounds</i> , 420 U.S. 395 (1975) _____	22
<i>Cherokee Nation v. Georgia</i> , 30 U.S. (5 Pet.) 1 (1831) _____	35
<i>Cherokee Nation v. Southern Kansas R. Co.</i> , 135 U.S. 641 (1890) _____	35
<i>Clark v. Uebersee Finanz-Korp.</i> , 332 U.S. 480 (1947) _____	22
<i>Colautti v. Franklin</i> , 439 U.S. 379 (1979) _____	21
<i>Colorado River Water Cons. District v. United States</i> , 424 U.S. 800 (1976) _____	31
<i>Consumer Product Safety Comm'n v. GTE Syl- vania, Inc.</i> , 447 U.S. 102 (1980) _____	20
<i>Crooks v. Harrelson</i> , 282 U.S. 55 (1930) _____	21
<i>Dawson Chemical Co. v. Rohm & Hass Co.</i> , 448 U.S. 176 (1980) _____	21
<i>FEC v. Democratic Senatorial Campaign Comm.</i> , 454 U.S. 27 (1981) _____	25
<i>Fidelity Federal Sav. & Loan Ass'n v. De La Cu- esta</i> , 458 U.S. 141 (1982) _____	21
<i>First Iowa Hydro-Electric Cooperative v. FPC</i> , 328 U.S. 152 (1946) _____	16, 25, 31

TABLE OF AUTHORITIES—Continued

	Pages
<i>FPC v. Idaho Power Co.</i> , 344 U.S. 17 (1952)	25
<i>FPC v. Oregon</i> , 349 U.S. 435 (1955)	25, 26, 31, 33
<i>FPC v. Tuscarora Indian Nation</i> , 362 U.S. 99 (1960)	14, 25, 37, 42
<i>FPC v. Union Electric Co.</i> , 381 U.S. 90 (1965)	44
<i>Griffin v. Oceanic Contractors, Inc.</i> , 458 U.S. 564 (1982)	20, 21
<i>Helvering v. Clifford</i> , 309 U.S. 331 (1940)	43
<i>Helvering v. Credit Alliance Corp.</i> , 316 U.S. 107 (1942)	22
<i>Howe v. Smith</i> , 452 U.S. 473 (1981)	20
<i>Hynes v. Grimes Packing Co.</i> , 337 U.S. 86 (1949)	8
<i>Idaho Power Co. v. FPC</i> , 346 F.2d 956 (9th Cir. 1965), cert. denied, 382 U.S. 957	25
<i>Kremer v. Chemical Construction Co.</i> , 456 U.S. 461 (1982)	45
<i>Lac Courte Oreilles Band v. FPC</i> , 510 F.2d 198 (D.C. Cir. 1975)	19, 41
<i>Martinez v. United States</i> , 302 F.Supp. 1069 (D. Colo. 1969)	33
<i>McEvoy v. United States</i> , 322 U.S. 102 (1944)	21
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130	36, 37, 38, 39, 41, 46
<i>Milwaukee v. Illinois</i> , 451 U.S. 304 (1981)	44
<i>Montana v. United States</i> , 450 U.S. 544 (1981), affirming on that issue <i>United States v. Montana</i> , 604 F.2d 1162 (9th Cir. 1979)	37
<i>Montana Power Company v. FPC</i> , 445 F.2d 739 (D.C. Cir. 1970), cert. denied, 400 U.S. 1013	18

TABLE OF AUTHORITIES—Continued

	Pages
<i>Morris v. Hitchcock</i> , 194 U.S. 384 (1904)	36
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974)	21, 42, 45, 46
<i>Mott v. United States</i> , 283 U.S. 747 (1931)	14, 39
<i>Nebraska v. Wyoming</i> , 325 U.S. 589 (1945)	33
<i>New York Indians (Fellows v. Deniston)</i> , 72 U.S. (5 Wall) 761 (1867)	35
<i>Pacific Power & Light Co. v. FPC</i> , 333 F.2d 698 (9th Cir. 1964)	22
<i>Poafpybitty v. Skelly Oil Co.</i> , 390 U.S. 365 (1968)	14, 39
<i>Portland General Electric Co.</i> , 28 FPC 924 (1962)	32
<i>Portland General Electric Co. v. FPC</i> , 328 F.2d 165 (9th Cir. 1964)	32, 33
<i>Radzanower v. Touche, Ross & Co.</i> , 426 U.S. 148 (1976)	45
<i>Red Loan Broadcasting Co. v. FCC</i> , 395 U.S. 367, (1969), quoted in <i>Milwaukee v. Illinois</i> , 451 U.S. 304 (1981)	43
<i>Reiter v. Sonotone Corp.</i> , 442 U.S. 330 (1979)	21
<i>Rubin v. United States</i> , 449 U.S. 424 (1981)	21
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	44
<i>Smith v. McCullough</i> , 270 U.S. 456 (1926)	29
<i>Southern California Edison Co.</i> , 8 FPC 364 (1949)	32
<i>Southern Pacific Transportation Co. v. Watt</i> , 700 F.2d 550 (9th Cir. 1983), cert. denied, 104 S.Ct. 393	39

TABLE OF AUTHORITIES—Continued

	Pages
<i>Stafford v. Brigge</i> , 444 U.S. 527 (1980)	29
<i>State of California v. FPC</i> , 345 F.2d 917 (9th Cir. 1965), <i>cert. denied</i> , 382 U.S. 941	32
<i>Turlock Irrigation District</i> , 31 FPC 515 (1964), <i>affirmed</i> , <i>State of California v. FPC</i> , 345 F.2d 917 (9th Cir. 1965)	32
<i>TVA v. Hill</i> , 437 U.S. 153 (1978)	45
<i>Udall v. FPC</i> , 387 U.S. 428 (1967)	23, 30, 32
<i>United States v. Appalachian Electric Power Co.</i> , 311 U.S. 377 (1940)	2, 33
<i>United States v. Mitchell</i> , 103 S.Ct. 2961 (1983)	18, 38, 41
<i>United States v. Montana</i> , 604 F.2d 1162 (9th Cir. 1979) <i>affirmed in part and reversed in part</i> , <i>Montana v. United States</i> , 450 U.S. 544 (1981)	37
<i>United States v. Rodgers</i> , 103 S.Ct. 2132 (1983)	19
<i>United States v. Santa Fe Pacific R. Co.</i> , 314 U.S. 339 (1941)	42
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978)	39
<i>United States v. 43 Gallons of Whiskey</i> , 93 U.S. 188 (1876)	35
<i>Washington v. Fishing Vessel Ass'n</i> , 443 U.S. 568 (1979)	39
<i>Watt v. Alaska</i> , 451 U.S. 259 (1981)	42
<i>Weinberger v. Hynson, Westcott & Dunning</i> , 412 U.S. 609 (1973)	22
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1982)	39
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	36, 39, 45
<i>Wilson v. Omaha Indian Tribe</i> , 442 U.S. 653 (1979)	29, 35
<i>Worcester v. Georgia</i> , 31 U.S. (6 Pet.) 515 (1832)	36

TABLE OF AUTHORITIES—Continued

Pages

STATUTES:

A. FEDERAL POWER ACT

§1, 16 U.S.C. §791a <i>et seq.</i>	1
§3(2), 16 U.S.C. §796(2)	4, 6, 14, 27
§3(11), 16 U.S.C. §796(11)	2
§3(13), 16 U.S.C. §796(13)	2
§4(e), 16 U.S.C. §797(e)	passim
§6, 16 U.S.C. §799	2, 23, 24, 34
§7(a), 16 U.S.C. §800(a)	2
§7(c), 16 U.S.C. §800(c)	2
§9(b), 16 U.S.C. §802(b)	31
§10(a), 16 U.S.C. §803(a)	passim
§10(e), 16 U.S.C. §803(e)	14, 15, 28
§10(g), 16 U.S.C. §803(g)	22, 24, 27, 33
§14, 16 U.S.C. §807	2, 33
§14(a), 16 U.S.C. §807(a)	3
§15, 16 U.S.C. §808	2, 3, 33
§15(a), 16 U.S.C. §808(a)	19
§21, 16 U.S.C. §814	38
§22, 16 U.S.C. §815	3
§23(b), 16 U.S.C. §817	14, 28
§27, 16 U.S.C. §821	31, 33
§29, 16 U.S.C. §823	39, 41
§313(b), 16 U.S.C. §825l(b)	26

B. OTHER STATUTES & REGULATIONS

16 U.S.C. §1536	16
25 U.S.C. §311	42
25 U.S.C. §323	40, 42
25 U.S.C. §324	36, 39, 42
25 U.S.C. §357	42
25 U.S.C. §476	36, 39
30 U.S.C. §352	16
43 U.S.C. §945	43

TABLE OF AUTHORITIES—Continued

	Pages
1 Stat. 50	35
25 Stat. 639	14
26 Stat. 391	43
26 Stat. 712 (Mission Indian Relief Act)	passim
26 Stat. 745	14
26 Stat. 1101	14
27 Stat. 420	14
30 Stat. 924	14
44 Stat. 198	36
90 Stat. 1275	36

25 C.F.R. §169.3(a)	36, 39
---------------------------	--------

C. LEGISLATIVE HISTORY

H. R. Rep. 2556, 49th Cong., 1st Sess. (1886)	7
H. R. Ex. Doc. 45, 50th Cong., 1st Sess. (1888)	7
H. R. Rep. 3282, 50th Cong., 1st Sess. (1888)	11, 41
H. R. Rep. 3251, 51st Cong., 2d Sess. (1890)	11, 12
H. R. Rep. 910, 66th Cong., 2d Sess. (1920)	43
H. R. Rep. No. 91-78, 91st Cong., 1st Sess. (1969)	36
H. R. Rep. 94-800, 94th Cong., 2d Sess. (1976)	36

S. Ex. Doc. 49, 48th Cong., 1st Sess. (1884)	6
S. Rep. 74, 50th Cong., 1st Sess. (1888)	6, 7
S. Ex. Doc. 118, 51st Cong., 1st Sess. (1890)	12

21 Cong. Rec. 3596 (1890)	11
22 Cong. Rec. 311 (1890)	12, 41
22 Cong. Rec. 312 (1890)	12
22 Cong. Rec. 313 (1890)	12
22 Cong. Rec. 554 (1890)	13
22 Cong. Rec. 786 (1890)	13
59 Cong. Rec. 1532-33 (1920)	2
59 Cong. Rec. 1570 (1920)	43
122 Cong. Rec. 29140 (1976)	36

<i>Hearing on Water Power Before the House Committee on Water Power, 65th Cong. 2d Sess. (1918)</i>	3
---	---

TABLE OF AUTHORITIES—Continued

	Pages
D. OTHER AUTHORITIES	
Cohen's Handbook of Federal Indian Law (1982 ed.)	35, 36
Cohen, "Original Indian Title," 32 Minn. L. Rev. 28 (1947)	35
1 C.J. Kappler, <i>Indian Affairs—Laws and Treaties</i> (1904)	9
J. Kerwin, <i>Federal Water-Power Legislation</i> 189 (1926)	2
16 Ops. A.G. 553 (1880)	11
18 Ops. A.G. 563 (1887)	11
Rights of Way, Flathead Reservation, 58 Int. Dec. 319 (1943)	44
T. Sedgwick, <i>The Interpretation and Construction of Statutory and Constitution Law</i> (2d ed. 1874) —	46

In The
Supreme Court of the United States
October Term, 1983

ESCONDIDO MUTUAL WATER CO., et al.,
Petitioners,

vs.

LA JOLLA BAND OF MISSION INDIANS, et al.,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit

**BRIEF OF RESPONDENTS LA JOLLA, RINCON,
SAN PASQUAL, PAUMA AND PALA BAND
OF MISSION INDIANS**

STATUTES INVOLVED

The provisions of the Mission Indian Relief Act (MIRA), 26 Stat. 712 (1891), and the most pertinent provisions of the Federal Power Act (FPA), 16 U.S.C. §§791a *et seq.*, are set forth in the Appendix to the Brief for the Secretary of the Interior.

STATEMENT OF THE CASE

The respondent Indian Bands adopt the Statement of the Case in the Brief for the Secretary of the Interior.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case arises under the relicensing provisions of the Federal Power Act (FPA). FPA Section 6, 16 U.S.C. §799, provides that the maximum term for any hydroelectric project is fifty years. When the original license expires, a new license can be granted to a new licensee or to the original licensee or the project can be taken over by the United States. FPA Sections 14 and 15, 16 U.S.C. §§807, 808. Although the Act grants a preference for applications by states and municipalities, FPA §7(a), 16 U.S.C. §800(a), original licensees are not entitled to any preference in relicensing proceedings. See 59 Cong. Rec. 1532-33 (1920); J. Kerwin, *Federal Water-Power Legislation* 189, 192 (1926).

The FPA's relicensing provisions were among its most important and controversial aspects. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 419-28 (1940); J. Kerwin, *Federal Water-Power Legislation* 189, 192, 195-96, 223-40, 260 (1926). The Act precisely spells out the rights of original licensees in the event the license is awarded to the government or to a new licensee. In return for obtaining original licenses, the original licensees are required to agree to turn over all licensed facilities and properties, including the private property that they bring to the project, at the expiration of the original license period. FPA Sections 3(11), 7(c), 14, 15, 16 U.S.C. §§796(11), 800(c), 807, 808; *United States v. Appalachian Electric Power Co.*, *supra*. If a new license is awarded to a new licensee or if the United States exercises its right to recapture, the original licensee is entitled to its "net investment" and to certain severance damages. FPA Sections 3(13), 14, and 15, 16 U.S.C. §796 (13), 807, 808. The FPA also provides for new licensees

and the United States to assume certain contractual obligations. FPA Sections 14(a), 15, 22, 16 U.S.C. §§807(a), 808, 815. See Pet. App. 312-27. The point of these provisions

is to have the Government at the end of the term unembarrassed, with its hands absolutely free and no system of equities built up by a licensee, by which he would force the government, either by law or sentiment, into a new arrangement with him.

Hearings on Water Power Before the House Committee on Water Power, 65th Cong., 2d Sess. 680-81 (1918).

2. The Petitioners in this case are seeking to obtain the use of Indian tribal lands without the Tribes' consent in order to take away water that otherwise would be available for the Indian reservations. Nothing in the two relevant statutes, the FPA and MIRA, authorizes the abrogation of Indian rights or the taking of tribal lands for purposes that are inimical to the Indians' best interests. To the contrary, both the FPA and MIRA were intended to benefit, protect, and preserve the integrity and the purposes of Indian reservations.

3. The reservation proviso to Section 4(e) of the Federal Power Act, 16 U.S.C. §797(e), is fundamental to all three issues under review. The proviso qualifies the Commission's authority to issue hydroelectric licenses involving federal reservations by stating:

That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

4. The first question presented is whether the reservation proviso means what it so plainly says, that the

Commission's licenses "shall be subject to and contain" the conditions that the appropriate Secretary deems necessary for the reservations' adequate protection. There is no ambiguity in the statute or its history. The proviso's plain meaning is consistent with several other provisions of the FPA which vest final authority over particular licensing matters in federal officials other than the Commission. It is also supported by all of the applicable canons of construction. The policy considerations urged by the petitioners and the Commission are not material to this question of statutory construction because the Court is not at liberty to appraise the wisdom of a particular course consciously selected by Congress and Congress obviously did not make the policy choices advocated by the Commission and the petitioners.

5. The second question is whether the three Indian reservations which are located downstream from licensed project works, but whose water rights are affected by the project, qualify for the protection of the reservation proviso. Indian water rights are clearly encompassed in the FPA's definition of reservations, "interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." FPA Section 3(2), 16 U.S.C. §796(2). There is no indication that the single word "within" as used in the reservation proviso was intended to deprive reservations that are significantly affected by a licensed project of the protection afforded by the reservation proviso. There are several reasons not to accord controlling significance to that one word. It would be contrary to the text of two other FPA provisions and also would undermine the evident protective purposes of both the reservation proviso and the Act's expansive definition of "reservations." Once it is determined that

a reservation's water rights are affected by a project and that the reservation therefore is covered by the Section 4(e) proviso, the nature and scope of any conflicting legal claims and legal rights to water are irrelevant to the issues that must be addressed by the appropriate Secretary and the Commission.

6. The third issue presented in this case involves the relationship between the reservation proviso and Section 8 of the Mission Indian Relief Act (MIRA). Section 8 provides that private parties can obtain rights of way for water conveyance facilities across MIRA Reservations by entering into a contract with the Indian owners which must be approved by the Secretary of the Interior. There are no clear indications in the FPA that Congress intended to abrogate the tribes' general power to prevent uses of land without their consent or any specific powers and rights vested in Indian tribes by treaty or statute. Giving full effect to Section 8 is entirely consistent with the FPA because the reservation proviso negates any possible inference that the Act was intended to authorize uses of tribal lands in a manner that is detrimental to the Indian owners. The reservation proviso also manifests Congress' intent not to abrogate preexisting rights and powers of Indian tribes. Moreover, the issuance of canal rights of way for this particular project should be governed by Section 8 in any event because the project's primary purpose is the conveyance of water, not the development of hydroelectric power, and Section 8 of MIRA is much more closely and specifically associated with the substance of this controversy than the FPA. Any doubts concerning this issue of statutory construction must be resolved in the Indians' favor.

ARGUMENT**I.****The Mission Indian Relief Act and The Federal Power Act Were Designed to Protect and Benefit Indian Reservations**

The three specific issues raised by the petitioners in this case concern the construction of Sections 3(2) and 4(e) of the Federal Power Act (FPA) of 1920, 16 U.S.C. §§796(2), 797(e), and the relationship between FPA Section 4(e) and the Mission Indian Relief Act (MIRA) of 1891, 26 Stat. 712, particularly Section 8 of that Act, 26 Stat. at 714. Before turning to those specific questions, however, it is important and useful to review the history, tenor and purpose of both MIRA and the FPA.

A. The Mission Indian Relief Act

The severe plight of the Mission Indians of Southern California was brought to the attention of the Nation and the Congress by an 1883 report by two Interior Department officials, Helen Hunt Jackson and Abbot Kinney. S. Ex. Doc. 49, 48th Cong., 1st Sess. 7-37 (1884), reprinted in S. Rep. 74, 50th Cong., 1st Sess. (1888). It told of the horrendous conditions under which the Indians were living. "[T]heir history has been one of almost incredible long-suffering and patience under wrongs." S. Ex. Doc. 49, *supra*, at 8-9. Although recognizing that "now it is, humanly speaking, impossible to render to them full measure of justice," the Report noted that it is within "our power to make them some atonement," and that, even aside from past injustices, the Mission Indians "are deserving of help on their own merits." *Id.*, at 10.

Jackson and Kinney paid special attention to the imperative need to secure the few remaining good irrigable lands with adequate water supplies for the Mission Bands.

There is no government land remaining in Southern California in blocks of any size suitable for either white or Indian occupancy. The reason that the isolated little settlements of Indians are being now so infringed upon and seized, even at the desert's edge and in stony fastnesses of mountains, is that all of the good lands, i.e. land with water or upon which water can be developed, are taken up.

Id., at 14.¹ They recommended that land with safe and secure boundaries be set aside for each band or village of Mission Indians, that all non-Indians living within the reservations be removed, *Id.*, at 10-11, and that trust patents be issued for whatever lands were eventually set aside so as to insure the permanence of Indian ownership, *Id.*, at 11-12.

The insecurity of reservations made merely by Executive Order is apparent. . . . The insecurity of reservations set apart by act of Congress is only a degree less. The moment it becomes the interest and purpose of white men in any section of the country to have such reservation tracts restored to the public domain, the question of it being done is only a question of influence and time. It is sure to be done. The future of these industrious, peaceable, agricul-

¹See also, H.R. Ex. Doc. 45, 50th Cong., 1st Sess. 2 (December 24, 1887 letter from Commissioner of Indian Affairs noting the "urgent need of aid from the Government to develop the water supply by irrigation through the several [Mission Indian] reservations"); S. Rep. 74, *supra*, at 3 ("Much of the land is valueless without irrigation, and the Indians are being deprived of their water rights wherever and whenever the interests of the whites demand the appropriation of such rights"). Similarly, H.R. Rep. 2556, 49th Cong., 1st Sess. 1 (1886), states:

. . . . We have permitted these Indians to be driven year after year from these lands, yielding up to the rapacious land-grabbers village after village and valley after valley which they had reclaimed from desert waste, by irrigation rendered rich and fertile.

Had their rights been guarded for even a short time after their accession they would have easily become part of our civilization, and aided greatly to simplify, instead of complicate, one of the great problems of our time.

tural communities ought not to be left a single day longer than is necessary, dependent on such changes; changes which are always against and never for the Indians' interests in the manner of holding lands.

Id., at 12.¹ See also, Int. Br. 2-4.

The Jackson-Kinney report led to the submission of a proposed bill to Congress by the Interior Department in 1884 for the relief of the Mission Indians. The bill, as amended, was eventually enacted as the Mission Indian Relief Act on January 12, 1891. 26 Stat. 712. The Act provided for the appointment of three commissioners by the Secretary of the Interior "to arrange for a just and satisfactory settlement of the Mission Indians . . . upon reservations" (Sections 1 and 7); the selection by the commissioners of reservations for each band or village of Mission Indians which correspond as closely as possible to the lands they occupied and possessed and are "sufficient in extent to meet their just requirements" (Section 2); the issuance of permanent trust patents for the reservations selected by the commissioners (Section 3); the allotment of reservation lands (Section 4); the issuance of permanent trust patents for the allotments and the prohibition of any conveyances of the allotments "or of any contract[s] . . . touching the same" prior to the expiration of the trust period (Section 5); the filing and defense of lawsuits by the Attorney General to protect the Indians' legal and equitable rights (Section 6); and procedures to obtain rights of way for water conveyance facilities (Section 8).

Following the appointment of the three-member Commission pursuant to Section 1 of MIRA and the comple-

¹See *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103-04 & n.24 (1949) (citing MIRA reservations as example of congressional intent to vest Indians with permanent, compensable property rights as opposed to mere rights of occupancy).

tion of its report, reservations were established for the various bands and villages throughout Southern California. See Int. Br. 3-4.³ One revealing indication of the extraordinary care, solicitude and attention that the federal government paid to insuring protection of the Mission bands' property interests was that "upon nearly all sides" the boundaries of the La Jolla Reservation were drawn to encompass "considerable mountain land worthless for any purpose except to prevent encroachments by others upon [the reservation's water, arable land and grazing land.]" III Ninth Cir. Joint App. 1073-74. Tragically and ironically, it is those very same mountain lands which house the encroachments that are the subject of this case.

MIRA, its legislative history and its subsequent implementation reveal the federal government's awareness of the unique difficulties faced by the Mission Indians of Southern California and its determination to overcome the problems that had plagued those Indians for decades. Particular attention was focused on the imperative needs to preserve the integrity of their reservations and to provide the Mission bands and villages with sufficient irrigable land and water to enable them to become economically self-sufficient. The government did everything

³The December 3, 1891 Report of the Commission is replete with references to the overriding importance of securing good, irrigable lands with available water supplies for the bands and villages within the watershed of the San Luis Rey River. See, e.g., III Ninth Circuit Joint App. 1066, 1070, 1073-74, 1110-11.

Many Mission Bands had occupied reservations established by Presidential Executive Orders prior to MIRA's enactment. See 1 C.J. Kappler, *Indian Affairs—Laws and Treaties* 819-24 (1904). In particular, the lands of the La Jolla and Rincon Reservations encompassed in Project No. 176 were originally set aside as Indian Reservations by Executive Orders in 1875 and 1881. See II Ninth Cir. Joint App. 456-460; 1 C.J. Kappler, *supra*, at 820, 822.

within its power to insure that the Indians' land and water rights would be fully and adequately protected and that their historical nightmare would end.

B. Section 8 of the Mission Indian Relief Act

Section 8 of MIRA was not included in the original bills prepared by the Interior Department. Attention focused on the need for a provision authorizing the issuance of rights of way for water conveyance facilities across the Mission Reservations as a result of certain proposals made by several Southern California water companies in the late 1880s.

As enacted by the Congress, Section 8 provides different procedures for obtaining rights of way depending on whether or not trust patents had been issued for the particular lands in question. Prior to the issuance of such patents, the Secretary of the Interior could grant canal rights of way, but only "upon condition that the Indians owning or occupying such reservation or reservations shall, at all times during such ownership or occupation be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior, and upon such others terms as he may prescribe." By contrast, once patents were issued, anyone wanting a right of way was required to enter into a contract with the tribe, band, or individual for whose use and benefit the lands are held in trust by the United States, "which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose."

The genesis of Section 8 were applications for rights of way for canals or flumes across the preexisting Mission Indian Reservations filed in the late 1880s by Southern

California water companies. The BIA agent believed that the proposals would benefit the Indians. Upon being advised of the applications, the Commissioner of Indian Affairs stated that "[t]he lands set apart and reserved for the Indians ought not to stand in the way of the development and occupation of the surrounding country, when no interests of the Indians can be injured thereby," but noted that the Department lacked legal authority to approve the proposed contract. See H. R. Rep. 3282, 50th Cong., 1st Sess. 3 (1888).⁴ Owing to the absence of such statutory authority, the Commissioner proposed amending the then pending bill to enable the Secretary of the Interior to grant rights of way for water conveyance facilities and short railroad lines across Mission Reservations. *Ibid.* The proposed amendment was identical to Section 8 as ultimately enacted except that the Secretary's authority to grant pre-patent rights of way was not subject to the condition that the Indians be supplied with sufficient water for irrigation and domestic purposes. See Pet. App. 19-20.

The House Committee on Indian Affairs recommended the enactment of the MIRA bill with the Interior Department's proposed amendment, H. R. Rep. 3282, *supra*, at 1, but the bill died in the House. In the next Congress, the Act again passed the Senate without Interior's amendment. H. R. Rep. 3251, 51st Cong., 2d Sess. 3 (1890).⁵

⁴The Commissioner's letter made reference to an Attorney General's Opinion, 18 Ops. A.G. 563 (1887) which in turn relied on an earlier opinion, 16 Ops. A.G. 553 (1880). Both opinions held that the Interior Department could not approve or enter into contracts conveying Indian property interests in the absence of authorizing legislation.

⁵In April, 1890, the Senate passed a resolution, 21 Cong. Rec. 3596, directing the Secretary of the Interior to inform the Senate of all the circumstances pertaining "to the occupation of

The Commissioner of Indian Affairs then urged the House to act on the bill (it had passed the Senate for the fourth time) and to consider the inclusion of the Interior Department's suggested amendment if it "would not jeopardize its passage." H. R. Rep. 3251, 51st Cong., 2d Sess. 3 (1890).

The House Committee recommended enactment of the Senate bill. H. R. Rep. 3251, *supra*. But on the House floor, the Chairman of the Committee moved to amend the Senate bill by adding Interior's proposal as a new provision, Section 8. 22 Cong. Rec. 311 (1890). In explanation, he stated:

I will say that the amendment was prepared by the Indian Office and has the sanction and endorsement of the Interior Department. It was also reported favorable by our committee in the Fiftieth Congress. It seems to be in keeping with the interest of these Indians. These lands are dry, arid lands as a rule, and it is necessary that there should be some order of this character, or at least a provision made in this bill, authorizing the Secretary of the Interior to grant these rights of way.

22 Cong. Rec. 311. The amendment was adopted, 22 Cong. Rec. 312, and so was the bill, 22 Cong. Rec. 313.

(Continued from previous page)

any portion of the Capitan Grande and the La Jolla Reserves of the Mission Agency in California by persons not Indians for ditches and flumes." The Senate Resolution specifically inquired "by what authority and under what right such occupation, if any, is maintained and what steps, if any, have been taken by the Department to protect the Indians in their rights with reference to the same." The Interior Department's response, with all of its supporting documentation, was reproduced in S. Ex. Doc. 118, 51st Cong., 1st Sess. (1890).

It is significant that the Senate was concerned enough about the water and water-related problems of the Mission Indians to adopt a resolution requiring a full report from the Interior Department and to publish the reply. Both the substance and the tone of its resolution reveal that the Senate was skeptical of the Interior Department's willingness and ability to protect the Mission Indians' precious water resources.

The bill, as amended by the House, then went to conference with the Senate. The conferees adopted the House amendment with one significant change. All pre-patent canal rights of way granted by the Secretary were made subject to the condition that the Indians be supplied sufficient water for irrigation and domestic purposes. As amended by the conferees, the full Senate adopted the bill. 22 Cong. Rec. 554 (1890). In the House, the conferees explained that the amended bill would "better secure and protect the rights and privileges of the Indians in and to their reservation lands." 22 Cong. Rec. 786 (1890). The House then followed suit, and MIRA was finally enacted and signed by the President.

Section 8 and its legislative history are significant for several reasons. They manifest Congress' awareness of the critical need of the Mission Indian Reservations for water and Congress' determination to protect that precious resource for use by the Indians and to prevent any interference by non-Indians. By its unwillingness to grant the Secretary unlimited authority over the issuance of canal rights of way prior to the issuance of trust patents, Congress revealed its skepticism of the Interior Department's ability to protect the Indians' most vital resource. Section 8 and its legislative history also reflect the judgments of both the Interior Department and the Congress that once patents for the reservations were issued, the Indian land-owners themselves would be in the best position to determine in the first instance whether canal rights of way should be granted.⁴ While contracts entered into by the

⁴In this connection, the 1890 Annual Report of the Interior Department stated: "The Mission Indians have arrived at that period in human progress where they should no longer be classed as Indians, but as citizens. . . . In nearly every village I find more or less good, intelligent, industrious men, fitted for

Indians were made subject to approval by the Secretary, the Secretary was not authorized to issue rights of way in the absence of contracts with the Indian owners. *Cf. Poafpybitty v. Skel'y Oil Co.*, 390 U.S. 365, 372 (1968); *Mott v. United States*, 283 U.S. 747, 751 (1931).

C. The Federal Power Act

The Federal Power Act "neither overlooks nor excludes Indians or lands owned or occupied by them." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960). "Tribal lands within Indian reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws" are included in the Act's definition of "reservations," §3(2), 16 U.S.C. §796(2), and the Commission's grant of authority encompasses hydroelectric projects "upon" or "affecting" such reservations, §§4(e), 23(b), 16 U.S.C. §§797(e), 817. The FPA also provides for the payment of compensation for the use of "tribal lands embraced within Indian reservations." §10(e), 16 U.S.C. §803(e).

But the authority delegated by the Federal Power Act to the Commission over Indian lands is subject to two significant qualifications set forth in the first, or reservation, proviso to Section 4(e), 16 U.S.C. §797(e). That proviso states:

(Continued from previous page)

citizenship." Attach. 5-01 to Ex. A-1, COR 2055, 2056-57. It was not common at that time for Indian tribes to be delegated such authority. Other contemporaneous statutes either granted canal and ditch rights of way over Indian reservations directly, e.g. Act of January 1, 1889, 25 Stat. 639 (Papago Reservation); Act of February 10, 1891, 26 Stat. 745 (Umatilla Reservation); Act of January 20, 1893, 27 Stat. 420 (Yuma Reservation), or vested authority over such rights of way in the Secretary, e.g., Section 1 of the Act of March 1, 1899, 30 Stat. 924, 941 (Uintah Reservation); Act of March 3, 1891, 26 Stat. 1101, 43 U.S.C. § 946 (partially repealed).

That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.⁷

There are several noteworthy aspects of this proviso. First, the qualifications on the Commission's authority are absolute; they admit of no exceptions. Licenses within reservations may be issued "only after" the required finding by the Commission. They must also "be subject to and contain" the protective conditions deemed necessary by the appropriate Secretary. Second, the two requirements are conjunctive. Licenses cannot be issued unless the Commission makes the interference/inconsistency finding *and* must contain the Secretary's conditions. Third, the proviso expressly differentiates between the roles of the Commission and the appropriate Secretary. The Commission is empowered to determine whether the license interferes or is inconsistent with the purpose of reservations, whereas it is the Secretaries' responsibility to formulate and prescribe the conditions deemed necessary for the reservations' adequate protection and utilization. Fourth, the protections afforded reservations are extremely stringent. The license must be consistent with the reservations' purposes. Any interference with those purposes is prohibited. And the Secretaries' conditions must insure not only the

⁷Another limitation contained in one of the 1935 amendments to the FPA is that the annual charges fixed by the Commission for the use of tribal lands are "subject to the approval of" the affected Indian tribe. § 10(e), 16 U.S.C. § 803(e). The meaning and scope of that provision was raised and argued below but was not decided by the Court of Appeals and is not encompassed in the questions presented to this Court.

reservations' adequate protection, but also their utilization.

The obvious purpose of the reservation proviso is to insure that the interests and the welfare of reservations subject to its protection are not subordinated to the requirements of hydroelectric projects. The needs of the reservations are primary.³ This plain meaning of the reservation proviso is entirely consistent with, and given added force by, other provisions of the Federal Power Act, the Act's legislative history, and its contemporaneous, administrative construction.

In addition to the reservation proviso, several other sections of the Act explicitly vest authority over various aspects of hydroelectric licenses in other federal officials. See Int. Br. 19-20. Viewed in the context of the entire Act, the reservation proviso is not an aberration. Rather, the primacy of reservation interests is parallel to other provisions of the statute which subordinate the Commission's licensing jurisdiction over hydroelectric projects to other federal concerns, maintaining the navigable capacity of waterways, operating fishways, conserving fish and wildlife resources, and regulating navigation. In all of these areas, the FPA expressly delegates ultimate authority to federal officials other than the Commission. This aspect of the Act was noted in *First Iowa Hydro-Electric Co-operative v. FPC*, 328 U.S. 152, 164 & n.9 (1946), in which

³It is not uncommon for Congress to make the exercise of authority by one federal agency subject either to the review or the conditioning authority of other agencies. See, e.g., 16 U.S.C. § 1536 (interagency cooperation and consultation required to insure conservation and preservation of endangered and threatened species); 30 U.S.C. § 352 (Secretary of the Interior authorized to enter into mineral leases of lands acquired by the United States subject to the consent of, and the conditions prescribed by, the head of the agency having jurisdiction over those lands).

the Court contrasted the limited role of the States under the statutory scheme with "the 'comprehensive' planning which the Act provides shall depend upon the judgment of the . . . Commission or other representatives of the Federal Government," citing, *inter alia*, FPA §4(e), emphasis added. *See also*, 328 U.S. at 167-68.

The legislative history of the reservation proviso also confirms its plain meaning. *See* Int. Br. 24-27. There is no doubt that the executive officials who drafted the Act and the members of Congress who enacted it knew precisely what they were doing. They made sure that the Commission's licensing jurisdiction would not take precedence over such paramount federal interests as the maintenance and regulation of navigation and the preservation of the integrity of Indian and other federal reservations.

The Commission's own *contemporaneous* construction of the Federal Power Act also demonstrates that Indian interests cannot be subordinated to the beneficiaries of hydroelectric projects. In 1929, the Commission considered a proposal for the development of a power site on the Flathead Indian Reservation. The non-Indian settlers on a federal irrigation project within that Reservation claimed that the tribally owned power site should be used to subsidize the project by providing "cheap power" for pumping and other purposes. This proposal was considered and rejected by the Commission's Senior Attorney in an extensive Memorandum to the Executive Secretary of the Commission.⁹

The memorandum analyzes the pertinent provisions of the FPA and states (at p. 23) that "[t]he function of

⁹This memorandum is included in the COR at 24,399-427. A copy has also been lodged with the Supreme Court Clerk.

the Secretary of the Interior in such cases, apart from his membership on the Commission and his authority to designate personnel from his department to perform work for the commission, is, under Sec. 4(d) [now 4(e)], to prescribe conditions to be inserted in the license for the protection and utilization of the reservation." COR 24,421. The memorandum's conclusion was that neither the Federal Power Act nor any other statute applicable to the proposed Flathead development detracted from or abrogated the federal government's fiduciary obligations to the Tribes on the Flathead Reservation. The Commission's treatment of the Flathead project is especially significant because it was the first, major Indian project to be considered for licensing and accordingly was viewed a test case. *See Montana Power Company v. FPC*, 445 F. 2d 739, 751 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 1013.

The major flaw in the arguments of the petitioners and their allies is their entirely unsupported and unfounded assumption that the Federal Power Act authorizes the subordination of reservation and Indian interests to those of hydroelectric developments. To the contrary, the Act, its legislative history, and its contemporaneous administrative construction unquestionably show that it was intended to preserve and strengthen the fiduciary relationship between the United States and the Indian tribes with regard to their trust property. The delegation of management authority over tribal property to the Commission and the Secretary of the Interior is not in any way inconsistent with that fiduciary relationship, *United States v. Mitchell*, 103 S.Ct. 2961, 2972 & n.29 (1983), especially where, as here, that delegation is qualified by provisions designed for the special benefit and protection of Indian reservations.

II.

The Secretary's Section 4(e) Conditions Are Mandatory

With this background in mind, the first specific issue to be addressed is whether the Commission may modify or reject the Secretaries' Section 4(e) conditions.¹⁰

It is hard to imagine a clearer statutory directive. Licenses for hydroelectric projects issued by the Commission "shall be subject to and contain" conditions that the appropriate Secretary "shall deem necessary" for the reservations' "adequate protection and utilization." The language, "licenses shall be subject to and contain conditions," is definitive and admits of no ambiguity. It is worlds apart from other phrases that might have been used to subordinate the Secretaries' authority to the Commission's, such as "the Secretaries may recommend" conditions or "the Commission may include conditions recommended by the Secretaries." *See* Int. Br. 22 n. 25.

Petitioners and the Commission focus their attention on the single word "shall", Comm. Br. 20-21; Pet. Br. 36-37, ignoring the rest of the phrase as well as the structure of the reservation proviso. *See United States v. Rodgers*, 103 S. Ct. 2132, 2149 (1983). But the obvious inference to be drawn from the language, particularly the clause, "subject to and contain such conditions as the Secretary . . . shall deem necessary" is that the Secretary's §4(e) conditions must be included in the license. Though

¹⁰The Petitioners contend that the reservation proviso does not apply to new licenses issued under FPA § 15(a), 16 U.S.C. § 808(a). Pet. App. 42-44. The short answer is that Section 15(a) authorizes the issuance of new licenses "upon such terms and conditions as may be authorized or required under the then existing laws and regulations," and the reservation proviso to Section 4(e) is plainly an "existing law." *Lac Courte Oreilles Band v. FPC*, 510 F.2d 198, 205 n.22 (D.C. Cir. 1975). *See also*, Int. Br. 21 n. 24.

not impossible, it would be odd for the permissive word "may" to be employed in conjunction with the clause, "subject to *and* contain". In Congress' intent were to treat the Secretary's conditions as advisory, it is far more likely that it would have simply used the verb "recommend".

The mandatory nature of the Secretary's conditions is also reinforced by the structure of the proviso which carefully spells out the respective responsibilities of the Commission and the Secretaries over reservations. Since the Commission was assigned a specific task, determining whether licenses interfere or are inconsistent with the purposes of reservations, it is most unlikely that Congress intended that the Commission also perform the additional function of reviewing the Secretaries' conditions. The language of the reservation proviso itself is cogent proof that Congress knew how to differentiate between the respective responsibilities of the Secretaries and the Commission and that it did not intend to subordinate the Secretaries' condition power to the Commission's licensing authority. It also demonstrates that Congress specifically intended to provide dual safeguards for reservations, the Commission's interference/inconsistency finding "*and*" the Secretaries' protective conditions.

The petitioners and their allies bear an extremely heavy burden in attempting to persuade a court to adopt a construction of a statute that so flagrantly contradicts its plain meaning. When the terms of a statute are unambiguous, our inquiry comes to an end, except in rare and exceptional circumstances." *Howe v. Smith*, 452 U.S. 473, 483 (1981). "Where [Congress] will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982), quoting *Con-*

sumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). The Court is not at liberty to appraise the wisdom of a particular course consciously selected by Congress. *Rubin v. United States*, 449 U.S. 424, 431 n.8 (1981). Indeed, in resolving issues of statutory construction, "questions of public policy cannot be determinative of the outcome unless specific policy choices fairly can be attributed to Congress itself." *Dawson Chemical Co. v. Rohm & Hass Co.*, 448 U.S. 176, 220 (1980). Even if the Court were convinced that the plain meaning of the law produces results that are "mischievous, absurd, or otherwise objectionable, . . . the remedy lies with the law making authority, and not with the courts." *Griffin v. Oceanic Contractors, Inc.*, *supra*, 458 U.S. at 575, *quoting Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

The Court of Appeals properly rejected the argument that the Secretaries' powers under the reservation proviso should be subordinated to the Commissioner's general responsibilities under FPA Section 10(a), 16 U.S.C. §803(a). Pet. App. 23-24. Any other result would be contrary to several additional and controlling canons of construction: that effect must be given to all provisions of a statute if at all possible, *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 163 (1982); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), that a general provision will not nullify a matter that is specifically dealt with in another part of the statute, *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *McEvoy v. United States*, 322 U.S. 102, 107 (1944), and that courts should not adopt an interpretation that would render any provision of a statute superfluous, *Andrus v. Glover Construction Co.*, 446 U.S. 608, 618 n.19 (1980); *Colautti v. Franklin*, 439 U.S. 379, 392

(1979).¹¹ That holding is further buttressed by FPA Section 10(g), 16 U.S.C. §803(g), which subjects licenses to "such other conditions not inconsistent with the provisions of this Act as the Commission may require." Thus, the Commission's Section 10(g) conditions cannot supersede the powers vested in the Secretaries under Section 4(e). And if there were ambiguity in the statute as a whole, which we emphatically deny, the doubts must be resolved in the Indians' favor. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).

Nor is there any conflict or inconsistency between Section 4(e)'s conditioning clause and any other feature of the Act. This Court's task is to harmonize all provisions of the FPA. *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 631-32 (1973); *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 488 (1947); *Helvering v. Credit Alliance Corp.*, 316 U.S. 107, 111-12 (1942). Here that is easily accomplished.

Congress unquestionably centralized authority over hydroelectric licensing in the Commission. Comm. Br. 21. That purpose is fulfilled by insuring that the Commission "coordinate" the functions of all other federal agencies¹² and that all non-federal hydroelectric developments, including those on Indian and other federal reservations, be

¹¹The position advanced by the petitioners and the Commission would deprive the secretarial conditioning clause of all meaning because anyone can recommend that the Commission impose certain conditions on a license. See, e.g., *Pacific Power & Light Co. v. FPC*, 333 F.2d 698 (9th Cir. 1964) (conditions for fishery protection recommended by State of California).

¹²See the 1918 transmittal letter of the Secretaries of War, Interior and Agriculture to the House of Representatives quoted in *Chemehuevi Tribe of Indians v. FPC*, 489 F.2d 1207, 1220-21 n.62 (D.C. Cir. 1973), *reversed on other grounds*, 420 U.S. 395 (1975).

subject to licensing by the Commission. It does not require, or even suggest, that the Commission must have ultimate authority over all licensing issues. It would make as much sense to argue that the FPA provisions empowering the Commission to issue licenses for projects on reservations should be disregarded because Congress has granted other federal officials comprehensive management authority over those reservations.

Similarly, the existence of a broad statutory standard authorizing the Commission to determine whether licenses generally are in the public interest, FPA §10(a), 16 U.S.C. §803(a), *see Udall v. FPC*, 387 U.S. 428, 449-50 (1967) is not inconsistent with delegations of final authority over specific areas of concern, such as federal reservations and navigation, to other federal officials. Taken together, these provisions simply mean that all matters affecting the public interest, *except those specifically delegated to other federal officials*, must be considered and addressed by the Commission.

The fact that the Commission is empowered to make the interference/inconsistency finding does not mean that it must have final say over all matters that affect reservations. Rather, the division of responsibilities between the Commission and the Secretaries so evident on the face of the reservation proviso manifests Congress' intent to preserve the integrity of Indian and federal reservations by subjecting them to dual safeguards. In somewhat different ways, both the Commission and the appropriate Secretary must agree that reservation interests are not sacrificed for the sake of hydroelectric developments. *See Int. Br. 26.*¹³

¹³In an effort to manufacture an ambiguity, petitioners reach out to FPA § 6, 16 U.S.C. § 799. Pet. Br. 33-34. Section 6 pro-

In short, one can find conflict or ambiguity in the FPA only by starting from the false premise that the Commission necessarily must have ultimate authority over all hydroelectric licensing matters. That supposition simply begs the fundamental issue in this case, is not supported by *anything* in the Act or its history, and is contradicted by no less than five other FPA provisions which also expressly grant final authority over specific matters to federal officials other than the Commission. Since there is no indication anywhere that *Congress* intended to make the Secretaries' §4(e) conditioning authority subject and subordinate to the Commission's overall licensing jurisdiction, that public policy consideration cannot influence this Court's construction of the statute. *See supra* at 21.

Contrary to the arguments of the petitioners and the Commission, there has not been a long-standing and consistent administrative construction that supports their

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vides that licenses "shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act. . . ." Emphasis added. The provision goes on to state that "[l]icenses . . . may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice."

Nothing in this general provision either overrides or is the slightest bit inconsistent with the specific authority vested in the Secretaries under the reservation proviso. It certainly cannot be deemed to vest authority in the Commission and the licensee to amend or eliminate the Secretaries' Section 4(e) conditions. Any such "reconditioning" by the Commission plainly would not be "in conformity with this Act." *See also*, FPA § 10(g), 16 U.S.C. § 803(g). FPA Section 6 is so far removed from the issues concerning the Secretaries' Section 4(e) powers that it was not mentioned by the Commission in the discussion of that issue in its opinion, Pet. App. 143-47; was not cited in the Petition as a statutory provision involved in this case, Pet. 2; Pet. App. 381-82; and was not mentioned in the Commission's Brief to this Court or in either of the briefs below.

position. To the contrary, the Commission as well as the Secretaries of Interior and Agriculture have recognized the rights, powers, and responsibilities of the Secretaries over hydroelectric projects involving federal and Indian reservations. See Int. Br. 32-36. Even if prior administrative practice supported the Commission's position, it could not override the plain meaning of the reservation proviso. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981).

The efforts of the petitioners and their allies to draw support from previous judicial decisions construing the FPA also are unavailing. Not one of those decisions comes close to addressing the question of whether the Commission may reject or modify the Secretaries' Section 4(e) conditions. In *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), for example, the issue was whether the Tuscarora Tribe's fee lands were subject to the protection of the reservation proviso. Since the Court held that those lands are not encompassed within the Act's definition of "reservations," there was no occasion to consider the scope of the protection afforded by the proviso.

First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946), and *FPC v. Oregon*, 349 U.S. 435 (1955), involved the respective powers of the Commission and the states. Neither case raised any issues pertaining to the reservation proviso.¹⁴ *FPC v. Idaho Power Co.*, 344 U.S. 17, 19 (1952), and *Idaho Power Co. v. FPC*, 346 F.2d

¹⁴As previously noted (*supra* at 16-17), the *First Iowa* opinion includes dicta recognizing that the FPA delegates power to both the Commission and other federal representatives. The project at issue in *FPC v. Oregon* was partially located on Indian lands, but no Section 4(e) issues were presented because the Commission did not reject or modify any Secretarial conditions and the Indian tribe had given its consent to the use of its lands. See 349 U.S. at 444.

956, 958 (9th Cir. 1965), *cert. denied*, 382 U.S. 957, describe conditions proposed by the Secretaries as recommendations or suggestions. But those conditions were not prescribed pursuant to Section 4(e), and the decisions are therefore irrelevant for purposes of this case.

A holding that the Secretaries' conditions cannot be modified or rejected by the Commission does not prevent the Commission from hearing, considering and evaluating evidence and arguments concerning Section 4(e) conditions. It does not preclude consultation between the Commission and the Secretaries, nor does it bar the Commission from pointing out any defects it perceives in the Secretaries' conditions or from recommending changes.¹⁵ And it does not establish or create any unconditional veto powers. It simply means that when the licensing process is through, the Commission's licenses shall, in conformity with the directive of the reservation proviso, "be subject to and contain" the conditions that the Secretaries deem necessary for the adequate protection and utilization of reservations.

This conclusion has two important ramifications. It means, first, that the Secretaries' conditions, not the Commission's, are entitled to the presumption of validity for purposes of appellate court review. Put another way, the role of the court of appeals will be to determine whether the Secretaries' conditions, not the Commission's substitutes, are reasonable, supported by substantial evidence, and within the scope of authority delegated to the Secretaries. *See* FPA §§4(e), 313(b), 16 U.S.C. §§797(e), 825l(b); *Pet. App. 24-25, modified*, 32-33. *See also*, *Pet.*

¹⁵Mutually satisfactory solutions should be sought no matter who has the final say. *FPC v. Oregon*, 349 U.S. 435, 449 n.20 (1955).

App. 40-41 (dissenting opinion). Those determinations will be made on the basis of the administrative record compiled before the Commission in the same way that the appellate court would evaluate the validity of the Commission's Section 10(g) conditions.

The second important consequence of holding that Commission licenses must be subject to and contain the Secretaries' conditions is that the substantive content of the conditions will be governed by what is deemed necessary for the adequate protection and utilization of reservations, not by broad concepts of the public interest. *Cf.* Pet. App. 143. As applied to this case, for example, it would mean that the protection and utilization of reservations could not be sacrificed because there was not sufficient water to meet all needs. *See infra* at 32. *Cf.* Pet. App. 150-51. The needs of the reservations would be primary because that is what Congress so plainly intended.

III.

The Water Rights of the Downstream Reservations Qualify for the Protection Afforded by the Reservation Proviso

The word "reservations" is defined in FPA Section 3(2), 16 U.S.C. §796(2). That definition encompasses not only "tribal lands embraced within Indian reservations," but also: (i) "other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws"; and (ii) "lands and interests in lands acquired and held for any public purposes." Citing numerous authorities, the Court of Appeals concluded that the water rights of Indian reservations clearly are encompassed within the latter parts of this definition. Pet. App. 25-26. Neither the petitioners nor the Commission take issue with this conclusion.

The Court of Appeals went on to hold that the reservations located downstream from the physical facilities licensed under Project No. 176 are entitled to the benefit and protection of the reservation proviso. Pet. App. 26-28. Petitioners and the Commission point out and emphasize that the reservation proviso applies to "licenses issued *within* any reservation." Emphasis added. But they make no effort to reconcile that clause with the Act's definition of "reservations."

The water rights of the Pala, Pauma, and Yuima Reservations clearly qualify as "reservations," so the literal question that is posed concerning the applicability of the reservation proviso to these reservations is whether the license for Project No. 176 is "within" those water rights. That sounds odd because it is unclear what is meant by a license being "within" a water right. There are two choices. Since the word "within" does not make sense, or at the very least is ambiguous, in this context, it could be interpreted as meaning "affecting." We certainly know what it means for a license to affect a reservation's water right and there is no doubt that the license for Project No. 176 affects the water rights of the reservations located downstream from the licensed project works. *See e.g.*, Pet. App. 9, 23. The other alternative is to construe the single word "within" as manifesting an intent to limit the effect of the reservation proviso to projects with licensed facilities physically located within the exterior boundaries of federal reservations notwithstanding the FPA's much more expansive definition of "reservations."

There are several reasons for adopting the former position. First and foremost, the text of two other FPA provisions, Sections 23(b) and 10(e), 16 U.S.C. §§817,

803(e), refutes the argument advanced by the petitioners and the Commission. *See* Int. Br. 40 & 43.

The Court of Appeals' conclusion also is consistent with the purposes underlying both the reservation proviso and the Act's definition of "reservations." The purpose of the reservation proviso is protective, to insure that federal reservations are not adversely affected by hydroelectric developments. *See supra* at 14-18, 19-20, 23. As noted by the Court of Appeals, Pet. App. 27-28, that purpose would be undermined by requiring that projects must be physically located within a reservation's exterior boundaries in order for the proviso to apply. Similarly, the manifest purpose of the Act's expansive definition of "reservations", which clearly encompasses Indian water rights, would be defeated by imposing that restriction. It would also violate the canons of statutory construction that effect must be given to all provisions of a statute if at all possible, that no part of a statute should be rendered superfluous, that courts should strive to harmonize the provisions of a statute and to avoid inconsistencies, and that ambiguities must be resolved in the Indians' favor and in a manner that effectuates the statute's protective purpose. *See* authorities cited *supra* at 21-22. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665-66 (1979); *Smith v. McCullough*, 270 U.S. 456, 463-65 (1926); Pet. App. 27-28. In addition, since much more thought, consideration and attention were likely to have been given to the Act's definition of "reservations" than to the single word "within", it would be unreasonable to accord controlling significance to that one word. *See, e.g., Stafford v. Briggs*, 444 U.S. 527, 535 (1980).¹⁶

¹⁶Contrary to the Commission's argument (Comm. Br. 38), *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 114-15 (1960), does not dictate or even indicate a different result. The *Tuscarora*

The Commission argues that the protection afforded by the reservation proviso should be limited to "tribal lands embraced within Indian reservations" because the Commission lacks jurisdiction to adjudicate water rights. Comm. Br. 37-38. This argument entirely misconceives the nature of the licensing and conditioning functions. Once it is determined that a reservation's water rights are affected by a project, the nature and scope of any conflicting legal claims and legal rights to water have no bearing on the issues that must be addressed by the Secretaries or the Commission.

Here, the project's primary impact on all six Indian reservations is the same; it diminishes the water supply that otherwise would be available for use by the Bands. See Pet. App. 9, 23, 150-51. The Commission acknowledged that if the reservation proviso were not applicable, the project's adverse effects on the reservations' water supplies would have to be considered and analyzed under the broad public interest standard of FPA Section 10(a), 16 U.S.C. §803(a). Pet. App. 131-33, 139-40, 173-76. See *Udall v. FPC*, 387 U.S. 428, 449-50 (1967). Therefore, the question is not whether the FPA requires that the effects of the proposed project on the water supply of the Pauma, Yuima and Pala Reservations be taken into account, but whether the consideration of that issue is governed by the general public interest criterion of FPA Section 10(a) or the more specific and stringent standards of the reservation proviso. There is no apparent

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holding was that the "interests in land" encompassed in the FPA's definition of reservations are specific and concrete interests in real property, not abstractions such as the national interest in Indian welfare and protection. That holding is perfectly consistent with the decision below since reservation water rights are interests in real property that are owned by the United States. Pet. App. 26.

reason why the answer to that question should vary depending on whether a reservation happens to be physically touched by a licensed facility such as a road, trail or power line. *See* Pet. App. 27-28.

The analysis of the water issues in this case does not involve the adjudication of water rights regardless of whether that analysis is undertaken pursuant to the standards of Section 4(e) or Section 10(a). The adjudication of water rights is a complex undertaking in which a court determines the amounts of water to which various users are entitled by law and their relative priorities. *See, e.g., Cappaert v. United States*, 426 U.S. 128, 139-41 & n.5 (1976); *Colorado River Water Cons. District v. United States*, 424 U.S. 800, 802-05 (1976). By contrast, neither the reservation proviso nor Section 10(a)'s general public interest standard has anything to do with the resolution of disputed legal claims to water or with the adjudication of legal entitlements. Rather, their concern is with conflicting needs for water, specifically, whether and to what extent the utilization of water by proposed hydroelectric facilities adversely affects other existing or potential uses.¹⁷

¹⁷Though the Commission cannot adjudicate water rights, FPA § 9(b), 16 U.S.C. § 802(b), requires that the Commission "satisfy itself . . . that applicants for . . . licenses have whatever rights are necessary to utilize the water in question in the manner contemplated by their applications and, ultimately, in the manner required by the resulting licenses." Pet. App. 99. *See First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 177-78 (1946). Therefore, for purposes of the analyses undertaken pursuant to the reservation proviso as well as FPA § 10 (a), 16 U.S.C. § 803(a), it can be presumed that licensees have obtained whatever legal rights are necessary to divert and utilize the waters at issue. Lacking such rights, a license could not issue and Sections 4(e) and 10(a) would be irrelevant. *See also, FPA § 27*, 16 U.S.C. § 821, *construed in FPC v. Oregon*, 349 U.S. 435, 445 (1955) (the use of water in licensed hydroelectric projects cannot interfere with the vested water rights of others.)

If the issue is addressed under FPA Section 10(a), 16 U.S.C. §803(a), the Commission has broad discretion to decide how to make various uses of water as compatible as possible, and, in the event of conflict, to determine which uses best serve the overall public interest. *Udall v. FPC*, 387 U.S. 428, 449-50 (1967). But when reservations are involved, the Commission has no such discretion. The proviso prohibits the issuance of licenses that utilize water for hydroelectric projects in a manner that is inconsistent or interferes with the reservations' purposes. It also authorizes the Secretaries to prescribe conditions that they deem necessary to insure the reservations' adequate protection and utilization. In short, the water needs of reservations come first, not because of their legal entitlements, but because Congress directed that hydroelectric projects cannot be licensed if reservations are adversely affected.

This common sense approach to water related issues under the FPA has long been recognized and carried out by the Commission. The Commission has consistently imposed conditions on licenses requiring that project waters be utilized for purposes other than hydroelectric generation *when there was not even a claim to a water right for the competing use*. See *Southern California Edison Co.*, 8 FPC 364, 381-86 (1949); *Portland General Electric Co.*, 28 FPC 924, 928-29 (1962), *affirmed*, *Portland General Electric Co. v. FPC*, 328 F.2d 165, 176 (9th Cir. 1964); *Turlock Irrigation District*, 31 FPC 515 (1964), *affirmed*, *State of California v. FPC*, 345 F.2d 917, 923-24 (9th Cir. 1965), *cert. denied*, 382 U.S. 941. The rationale for these decisions is that devoting water to competing uses that are deemed to be in the public interest is part of the price that licensees must pay in return for the privileges and rights granted by a license. *State of California*

v. FPC, supra; Portland General Electric Co. v. FPC, supra. See also, *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 427-28 (1940) (upholding the validity of the FPA's conditions requiring the relinquishment of licensees' water and property rights at the expiration of the license period as "the price which must [be paid] to secure the right to maintain their dam."¹⁸

While the foregoing decisions and cases have involved conditions imposed pursuant to FPA Sections 10(a), 10(g), 14 and 15, 16 U.S.C. §§803(a), 803(g), 807 and 808, there is no reason why the Secretaries should not be able to carry out their Section 4(e) responsibilities in the same way. That is precisely the approach that the Secretary of the Interior took in formulating conditions to insure the adequate protection and utilization of the six Indian reservations involved in this case. JA 53, 146-51, 163-65, 168-70, 175-81, 222-26. The facts that the Bands and the United

¹⁸The same concept is incorporated in Section 8 of MIRA. Under that statute, the grantees of pre-patent canal rights of way are required to supply water to the Indians, not because of the Indians' superior water rights, but as part of the consideration for the right of way.

FPA Section 27, 16 U.S.C. § 821, precludes any interference with state laws governing the appropriation, use and distribution of water or of any water rights acquired pursuant to state law. See *supra* at 31 n.17. But cf. *Cappaert v. United States*, 426 U.S. 128, 144-45 n.10 (1976); *FPC v. Oregon*, 349 U.S. 435, 446-48 (1955) (federal reserved water rights are established by the withdrawal of power sites from the public domain under the FPA). Section 27 does not, however, prevent the Commission or the Secretaries from requiring that waters controlled by licensees be devoted to other purposes in return for being granted the right to use public lands or reservations. "The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals." *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945). Imposing water related conditions on the grant of a right of way for a canal or ditch therefore does not affect or interfere with the underlying water right. See e.g., *Martinez v. United States*, 302 F. Supp. 1069 (D. Colo. 1969). See also, *United States v. Appalachian Electric Power Co.*, *supra*, 311 U.S. at 427-28; FPA §§ 10(a), 10(g), 16 U.S.C. §§ 803(a), 803(g).

States have colorable, prior, legal claims to the waters at issue and that San Luis Rey River water rights are in dispute and are being litigated in another forum can neither deprive the Secretaries of their power nor diminish their obligation to prescribe conditions that are necessary for the reservations' protection and utilization. Such conditions are not attributable to, or dependent on, the rights and priorities established by federal or state water laws. Rather, they are part of the price that licensees must pay in return for the privileges obtained by Commission licenses. In this sense, they are voluntary and contractual in nature, the very antithesis of adjudicatory, because they can be accepted or rejected by the licensees. FPA §6, 16 U.S.C. §799; Pet. App. 223, 225.

IV.

Licensing the Use of Tribal Lands for Canal Rights of Way Requires the Bands' Consent

This is an unusual case. The petitioners have applied to a federal agency to obtain permission to use tribal lands within three Indian Reservations, La Jolla, Rincon and San Pasqual, for a canal that diverts water away from those three reservations as well as three additional downstream reservations. The lands of all six reservations are held in trust by the United States for the Bands' sole use and benefit. Since the petitioners' proposed project is so obviously contrary to the interests of the six affected Indian reservations, the three Bands have withheld their consent to the inclusion of their lands in the project. The ultimate irony of this case is that this contral problem was foreseen when MIRA was enacted in 1891 and specific procedures for its resolution were included in Section 8 of that Act.

The issue of whether the use of the Bands' lands can be obtained without their consent under the circumstances

of this case ultimately involves consideration of the relationship of two statutory provisions, the Section 4(e) reservation proviso and Section 8 of MIRA. But that issue of statutory construction cannot properly be understood apart from long-recognized powers of Indian tribes that go back several centuries.

One of the first acts of our Congress was the ratification of the Northwest Ordinance of 1787 which provides:

The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty they shall never be invaded or disturbed unless in just and lawful wars authorized by Congress. . . .¹⁹

1 Stat. 50, 52 (1789). While the federal government has authority to extinguish tribal title without obtaining the Indians' consent, *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641 (1890), that raw power has been exercised sparingly. See, Cohen, "Original Indian Title," 32 Minn. L. Rev. 28, 33-43 (1947) ("[T]he historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emporor or czar but from its original Indian owners"); *Cohen's Handbook of Federal Indian Law* 53-55 (1982 ed.).

The continuing vitality of this fundamental principle was illustrated twice in recent years, when a congressional committee expressed its outrage at proposed regulations

¹⁹This policy is expressed in countless Supreme Court decisions, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 197 (1876); *New York Indians (Fellows v. Deniston)*, 72 U.S. (5 Wall) 761, 768 (1867); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979). Its historic origins have been traced to a 1532 treatise by a leading spanish intellectual, Francisco de Victoria. See *Cohen's Handbook of Federal Indian Law* 50-52 (1982 ed.)

that would have authorized the issuance of rights of way across tribal lands without the Indians' consent, H. R. Rep. 91-78, 91st Cong., 1st Sess. (1969);²⁰ Pet. App. 18-19, and when Congress enacted a law, 90 Stat. 1275 (1976), repealing a 1926 law that had authorized the condemnation of Pueblo Indian lands in New Mexico (44 Stat. 198) "in order to place the Pueblo Indians in a position of equality with other tribes." H.R. Rep. 94-800, 94th Cong., 2d Sess. 4 (1976). On both occasions, it was recognized that special acts could be passed if the acquisition of Indian lands were required by public necessity and tribes unreasonably withheld their consent. H. R. Rep. 91-78, *supra*, at 9-10, *quoted in* Pet. App. 18; H. R. Rep. 94-800, *supra*, at 3-4; 122 Cong. Rec. 29140 (1976) (remarks of Senator Domenici). *See also*, 25 U.S.C. §§324, 476; 25 C.F.R. §169.3(a). But Congress unequivocally expressed its support for the general principles that tribal consent ordinarily is, and should be, required and that the decision to dispense with that requirement on a case by case basis should rest with the Congress, not officials of the executive branch.

As a corollary of their power to prevent the disposition of their lands without their consent, Indian tribes have long been recognized to possess the authority to exclude non-Indians from tribal lands. *See, e.g., Williams v. Lee*, 358 U.S. 217, 219 (1959); *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832); *Cohen's Handbook of Federal Indian Law* 252 (1982 ed.) This power was recognized and reaffirmed by all members of the Court recently in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-44 (majority opinion),

²⁰The Committee expressed its agreement with "one of the oldest principles of jurisprudence in America—that Indian tribes should not be deprived of rights in their land without their consent." *Id.*, at 17.

160, 173-85 (dissenting opinion) (1982), in which the majority expressly noted its agreement with the dissent's position that "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands. . . ." 455 U.S. at 141.²¹ See also, *Montana v. United States*, 450 U.S. 544, 557 (1981), affirming on that issue *United States v. Montana*, 604 F.2d 1162, 1165-66 (9th Cir. 1979).

The Bands' sovereign power to exclude non-Indians from their lands arguably provides an independent basis for concluding that licensing the use of the Bands' lands requires their consent. Putting aside for a moment both the reservation proviso and MIRA Section 8, the question would be whether the Federal Power Act (without the reservation proviso) deprives Indian tribes of their pre-existing power to exclude non-Indians from tribal lands. See *Merrion v. Jicarilla Tribe*, *supra*, 455 U.S. at 149-52 (holding that Indian tribes have not been divested of their power to impose severance taxes). Although this issue was not expressly presented or considered in *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), the Court's analysis and result would lend support to the position of the Commission and the petitioners.²² But more recent au-

²¹The dissent characterized the tribes' "power to exclude nonmembers entirely from the territory reserved for the tribe" as "a power unknown to any other sovereignty in this Nation." 455 U.S. at 160 (Stevens, J. dissenting).

²²*Tuscarora* is directly comparable to the situation that would exist in the absence of the reservation proviso and Section 8 of MIRA because this Court held that the Tuscarora fee lands were not entitled to the protection of the reservation proviso, 362 U.S. at 110-15; *supra* at 25, and that the taking of the Tuscarora's land for the Niagara Falls hydroelectric project did not violate any right granted to the Tuscaroras by treaty or statute, 362 U.S. at 106 n.10, 121 n.18, 123, 124. Contrary to the arguments of the Commission (Br. 13-14) and the petitioners (Br. 21), *Tuscarora* did not hold that the FPA authorizes

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thorities, particularly *United States v. Mitchell*, 103 S. Ct. 2961 (1983), and *Merrion*, *supra*, point strongly in the opposite direction. *Mitchell* stands for the proposition that statutes authorizing the federal government to assume control or supervision over tribal properties normally give rise to a fiduciary relationship between the government and the Indians unless Congress has provided otherwise, even though there is no express creation of a trust. 103 S. Ct. at 2972. The continuation of a fiduciary relationship would be inconsistent with an intent to abrogate one of the most fundamental tribal powers. Similarly, *Merrion* holds that the sovereign powers of Indian tribes cannot be divested "in the absence of clear indications of legislative intent" and that any ambiguities on this score must be resolved in the tribes' favor. 455 U.S. at 149, 152. There is certainly nothing in the FPA that expressly abrogates the government's trust obligations or clearly divests the tribes of their sovereign power to prevent the use of their lands without their consent. It is therefore not at all clear that the Bands' lands could be licensed by the Commission without their consent even in

the abrogation of rights guaranteed to Indian tribes by specific treaties and statutes. Indeed, the concluding sentence of the majority opinion strongly suggests that such rights would survive the Federal Power Act even in the absence of the reservation proviso:

All members of this Court—no one more than any other—adhere to the concept that agreements are made to be performed—no less by the Government than by others—but the federal eminent domain powers conferred by Congress upon the Commission's licensee, by § 21 of the Federal Power Act, to take such of the lands of the Tuscaroras as are needed for the Niagara project do not breach the faith of the United States, or any treaty or other contractual agreement of the United States with the Tuscarora Indian Nation in respect to these lands for the conclusive reason that there is none.

362 U.S. at 124.

the absence of both MIRA Section 8 and the reservation proviso.²³

The delegation of authority to the Commission (or any other federal official) to license the use of tribal lands is not, in and of itself, necessarily inconsistent with a requirement of tribal consent. See, e.g., 25 U.S.C. §§324, 476; 25 C.F.R. §169.3(a); *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983), cert. denied, 104 S. Ct. 393. Cf. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 372 (1968); *Mott v. United States*, 283 U.S. 747, 751 (1931) (federal officials not authorized to lease Indian lands unless the Indian owners agree). Of course, the existence of such authority does mean that the Commission's concurrence is a necessary, though not a sufficient,

²³The Commission originally gave three reasons for its rejection of the Bands' contention that they have the sovereign power to prevent the petitioners from using tribal lands without the Bands' consent: that tribal self-government pertains to internal, not external matters; that the reservations were not created for the purpose of granting self-government since the Bands' sovereignty is inherent; and, as a fallback position, that the Bands' exercise of any sovereign power that they might have to prevent the licensing of their lands would be inconsistent with the FPA and therefore was repealed by FPA Section 29, 16 U.S.C. § 823. Pet. App. 141-42. The third point is answered in the text, *infra*, at 39-42. With regard to the first, *Merrion* leaves no doubt that tribal sovereignty encompasses the power to exclude non-Indians from Indian lands. And while it is true that the reservations were not established in order to grant sovereignty to the Bands, nothing in the FPA requires a showing that any purpose came about solely as a result of the establishment of the reservation. Indeed, virtually all Indian rights predate the establishment of reservations. *Washington v. Fishing Vessel Ass'n*, 443 U.S. 568, 679-81 (1979); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). Since reservations are places where the Indians can "make their own rules and be ruled by them," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1982), quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959), and be free of unwanted intrusions by non-Indians, *Merrion*, *supra*, licensing the use of tribal lands without the tribes' consent interferes and is inconsistent with that self-government purpose.

condition for tribal lands to be used in hydroelectric projects. *See* Pet. App. 21.²⁴ Whether requiring tribal consent is inconsistent with the powers granted to the Commission depends on the Act's ultimate purpose. Tribal consent would not be consistent with the Act if the intent of the FPA were to subordinate Indian interests to the development of hydroelectric projects. But requiring consent would be compatible with a policy of developing and authorizing projects that are consistent with the reservations' purposes and the government's fiduciary responsibilities. *See* Pet. App. 27; *Arizona Power Authority*, 39 FPC 955, 958 (1968) (Commission imposed condition requiring Tribe's consent to the use of tribal waters in hydroelectric projects).

The existence of the reservation proviso and Section 8 of MIRA tips the balance overwhelmingly in the Bands' favor. As discussed *supra* at 6-10, the overall purpose of MIRA was to protect and preserve the property rights of the Mission Bands so that the deplorable conditions under which they were living would be improved and they would eventually be able to become economically self-sufficient. The particular purpose of Section 8 of MIRA was to vest the Mission Bands with power to prevent encroachments on their vitally needed water supplies once trust patents were issued. *See supra* at 10-14. The existence of the reservation proviso negates any possible inference that the FPA was intended to permit uses of tribal lands in a manner that works to the detriment and disadvantage

²⁴As noted by the Commission (Br. 28 n.31) and the petitioners (Br. 17), the general act authorizing grants of rights of way across Indian lands, 25 U.S.C. §§ 323 *et seq.*, includes a provision exempting rights of way granted under the FPA. This means that uses of tribal lands for hydroelectric projects cannot be authorized without the Commission's approval.

of the Indian owners and manifests Congress' intent to preserve preexisting Indian rights and powers. *Supra* at 14-18; App. 21; *Lac Courte Oreilles Band v. FPC*, 510 F.2d 198, 210-12 (D.C. Cir. 1975). Accordingly, Section 8 of MIRA was not affected by FPA Section 29, 16 U.S.C. §823, which only repeals "all Acts or parts of Acts inconsistent with this Act."²⁵

As a theoretical matter, it is just as logical to conclude that the powers delegated to the Commission under the FPA would be exercised in a manner that would be fully consistent with the government's fiduciary relationship and the tribes' preexisting powers as it would to assume that Indian interests would be subordinated to hydroelectric developments and that requiring tribal consent therefore would be likely to thwart the FPA's policies. As a legal matter, the continuation of the fiduciary relationship and the preservation of tribal sovereignty are presumed absent clear indications to the contrary. *United States v. Mitchell, supra*; *Merrion, supra*; *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339,

²⁵The Commission's original reason for rejecting the Bands' and Interior's reliance on Section 8 of MIRA was its contention that that provision did not apply to the issuance of rights of way for canals, ditches and the like. Pet. App. 156-57. That argument has not been renewed by the Commission or the petitioners in this Court or in the Court of Appeals, and for good reason. The next to the last sentence of Section 8 expressly refers to grants of rights of way or easements. One way, indeed the most common way, of granting permission to construct ditches or canals is by granting rights of way. The legislative history of Section 8 shows that it was proposed by the Interior Department for the specific purpose of granting rights of way for canals and ditches, H.R. Rep. 3282, 50th Cong., 1st Sess. 3, 4 (1888), and that that was the shared understanding of the Congress, 22 Cong. Rec. 311 (1890), quoted *supra* at 12. The 1894 agreement with the Potrero Band, which was entered into and approved pursuant to Section 8 only three years after MIRA's enactment, see Pet. Br. 23 & n.36, expressly grants "a right of way [across the La Jolla Indian Reservation] for the purpose of constructing, operating and maintaining an irrigating flume or canal . . ." JA 9, 14.

353-54, 356, 360 (1941). As a matter of statutory construction, the reservation proviso is conclusive proof that the FPA does not sanction any interference with the economic or sovereign purposes of Indian reservations and that the FPA is not inconsistent with MIRA.

This result is also supported by the rule that the Court will construe two statutes in a manner that gives effect to both while preserving their sense and purpose, rather than subordinating one to the other. *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981); *Morton v. Mancari*, 417 U.S. 535, 551 (1974); Pet. App. 21. As noted *supra* at 37-38 n.22, *Tuscarora* also strongly suggests that rights specifically granted Indian tribes by treaty or statute are not overridden by the Federal Power Act even if the Indian lands at issue are not subject to the protection of the reservation proviso.²⁶

²⁶The petitioners argue that Section 8 of MIRA and the FPA should be viewed as alternate means of acquiring canal rights of way across Mission Indian Reservations. Pet. Br. 26-28. They cite several lower court decisions holding that various kinds of rights of way across Indian allotted lands can be obtained either under a general condemnation statute, 25 U.S.C. § 357, or under general right of way statutes such as 25 U.S.C. § 311 and 25 U.S.C. §§ 323 and 324. *But cf.*, *Minnesota v. United States*, 305 U.S. 382, 391 (1939) (issue left open).

There are three major difficulties with applying the reasoning of those decisions to this case. First, the FPA's reservation proviso expressly prohibits the acquisition of interests in tribal lands in a manner that interferes or is inconsistent with the purposes and policies of laws establishing reservations. There were no comparable provisions in the statutes at issue in those cases. Second, the cases cited by the petitioners involve the relationship between a general statute authorizing the condemnation of allotted Indian lands and general statutes authorizing grants of rights of way across tribal lands. They have nothing to do with the effect to be given to a very specific protective provision of a law that is applicable to a very limited number of reservations. Third, the decision cited by the petitioners refuse to find that the earlier condemnation statute was repealed by the subsequent right of way acts. In this case, it is the petitioners and the Commission who are contending that the later statute, the FPA, implicitly repealed the earlier one, MIRA Section 8. See also, *infra*, at 45-46.

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Petitioners and the Commission place their principal reliance on the history of a proposed amendment to the FPA that would have expressly granted tribes on treaty reservations the power to withhold their consent to the inclusion of tribal lands in Commission licensed projects. Comm. Br. 27; Pet. Br. 14-16. The amendment passed the Senate, 59 Cong. Rec. 1570 (1920), but was eliminated in conference because "the conferees saw no reason why water power should be singled out from all other uses of Indian reservation land for special action of the council of the tribe." H.R. Rep. 910, 66th Cong., 2d Sess. 8 (1920).

This Court has frequently cautioned that "unsuccessful attempts at legislation are not the best guides to legislative intent." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 n.11 (1969), *quoted in Milwaukee v. Illinois*, 451 U.S. 304, 332 n.24 (1981). *See also, Bryant v. Yellen*, 447 U.S. 352, 376 (1980); *Helvering v. Clifford*, 309 U.S. 331, 337 (1940). The Conference Committee's only stated reason for rejecting the tribal consent amendment was its unwillingness to accord special treatment to uses of tribal lands for hydroelectric projects. This indicates that Congress' intent was for hydroelectric projects on tribal lands to be governed by the same rules that generally are applicable to other proposed uses of tribal lands

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Petitioners also refer to the reservation in the trust patents for the La Jolla, Rincon and San Pasqual reservations for rights of way for ditches or canals constructed by the authority of the United States. Pet. Br. 22. This provision was included in the patents pursuant to the Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. § 945. As applied to reservations established pursuant to MIRA, rights of way for ditches or canals constructed by the authority of the United States must be obtained pursuant to Section 8. In any event, this provision has no application to the lands of the Rincon and La Jolla Reservations which were set aside for Indian use prior to August 30, 1890. *See Rights of Way, Flathead Reservation*, 58 Int. Dec. 319 (1943); *supra* at 9 n. 3.

by non-Indians. That purpose was achieved by insuring that Commission licenses do not interfere and are not inconsistent with the reservations' purposes. There is no indication that any legal research was conducted, or that anyone in Congress considered whether Indian tribes generally possess the power to exclude non-Indians from their lands. Cf. *Bryan v. Itasca County*, 426 U.S. 373, 391-92 (1976); *FPC v. Union Electric Co.*, 381 U.S. 90, 105 (1965).²⁷ There was certainly no manifestation of congressional intent to abrogate any tribal sovereign power, to make it easier to obtain the use of tribal lands for hydroelectric facilities than for other proposed projects, or to deprive tribes of the benefit of their fiduciary relationship with the government. Most importantly for our purposes, the conferees did *not* state that the amendment was stricken because Indian interests should be subordinated to proposed power developments or because it was thought that an Indian consent requirement would interfere and be inconsistent with the overall policy of the FPA.²⁸

Thus, under the generally applicable rule of construction, Congress' ultimate rejection of the tribal consent amendment is entitled to very little weight. Still less can that history be relied on to support a finding that the sovereign powers of Indian tribes were implicitly abrogated. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S.

²⁷This is not surprising in view of the fact that the use of Indian lands for hydroelectric projects was only one aspect of the entire bill.

²⁸The petitioners quote several statements of Senators who opposed the tribal consent amendment on the Senate floor. Pet. Br. 14-16. These remarks are not entitled to any weight, however, because the amendment was adopted by the entire Senate and the only reason given by the conferees for not including the amendment in the final version of the bill was their unwillingness to treat proposed uses of tribal lands for water power projects any differently than other kinds of projects.

49, 62-66, 72 (1978) (Court refused to interpret a statute in a manner that "intrudes" on tribal sovereignty even when one of its acknowledged purposes was to strengthen the position of tribal members against tribes); *Bryan v. Itasca County*, 426 U.S. 373, 387-89 & n.14, 392 (1976) (Court refused to construe "admittedly ambiguous" statute that promoted assimilation of Indians in a manner that would undermine or destroy tribal governments); *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . . If this power is to be taken away from them, it is for Congress to do it.") And even less can that history be construed as an implicit repeal of Section 8 of MIRA. *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 468, 470 & n.10 (1982) (implied repeal must be evident from the language or operation of a statute); *TVA v. Hill*, 437 U.S. 153, 189 (1978); *Morton v. Mancari*, 417 U.S. 535, 550 (1974).

Finally, the Bands' consent should be required under the particular facts of this case even if it is assumed *arguendo* that the FPA would abrogate the sovereign power of the Bands' to exclude non-Indians from tribal lands and would operate as a repeal of MIRA Section 8 in other circumstances. The primary purpose of Project No. 176 is the diversion and conveyance of water; the generation of power clearly is an incidental and secondary function. Pet. App. 13-14, 338; Int. Br. 1-2, 8, 48-49. Section 8 of MIRA is the specific statute that governs the acquisition of rights of way for water conveyance facilities across Mission Indian Reservations. The principal purpose of the Federal Power Act, by contrast, is "licensing the construction, operation and maintenance of facilities for the development of [hydro]electric power. . . ." Pet. App. 338. See also, Pet. App. 145; *Chemehuevi Tribe of*

Indians v. FPC, 420 U.S. 395, 405 (1975). Accordingly, the issuance of canal rights of way for this project should be governed by MIRA Section 8 because its provisions are more closely associated with the specific substance of this particular controversy, even if an Indian consent requirement would not be applicable to projects whose primary and essential purpose is the development of hydroelectric power. *Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *Bowman v. Texas Educational Foundation*, 454 F.2d 1097, 1101 (5th Cir. 1972). As explained in *Radzanower* (quoting T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 98 (2d ed. 1874)):

[W]hen the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.

If there are any doubts concerning this issue of statutory construction, the Court "must be guided by that 'eminently sound and vital canon' . . . that 'statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians,'" *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (citations omitted), and in a manner that "'comport[s] with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'" *Merrión v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) (citation omitted).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

ESCONDIDO MUTUAL WATER COMPANY, ET AL.,
PETITIONERS

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA AND
PALA BANDS OF MISSION INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF FOR THE
FEDERAL ENERGY REGULATORY COMMISSION
URGING REVERSAL**

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QUESTIONS PRESENTED

1. Whether Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), requires that Mission Indian consent must be obtained under Section 8 of the Mission Indian Relief Act, ch. 65, 26 Stat. 714, before the Federal Energy Regulatory Commission (Commission) is authorized to issue a license for a hydroelectric project on Mission Indian Reservation lands.

2. Whether Section 4(e) of the Federal Power Act requires the Commission to accept without modification conditions submitted by the Secretary of the Interior for inclusion in a license for a hydroelectric project that utilizes Indian Reservation lands.

3. Whether the requirements of Section 4(e) of the Federal Power Act extend to three Mission Indian Reservations whose lands are not utilized for this hydroelectric project.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Statement	3
A. Background: The issuance of the original 50-year license	3
B. The issuance of the new license	6
C. The decision of the court of appeals	10
Introduction and summary of argument	13
Argument:	
I. The Commission, not the Bands or Interior, has the ultimate authority to determine whether a hydroelectric license should issue	17
A. The language and history of the Section 4(e) proviso make clear that the FPA grants central authority to the Commission to exercise licensing authority, not to the Bands or Interior	17
1. Statutory language	17
2. The legislative history	21
B. The Commission's approach in this case is faithful to the legal principles which evolved from the legislative background	31
1. The interference/inconsistency finding basically refers to uses of land, not title to water or Indian sovereignty	31
2. Interior's exercise of its Section 4(e) conditioning power must be reasonable....	33

IV

Argument—Continued

Page

C. The requirements of Section 4(e) do not extend to the three Mission Indian Reservations whose lands are not utilized for this hydroelectric project	36
D. Against this background considerations of deference and traditional rules governing judicial review of agency action require affirmation of the Commission's interpretation of the Section 4(e) conditioning power	39
II. In any event, contrary to the ruling below, Section 8 of MIRA does not bar the Commission from issuing a license without the consent of the Bands	43
Conclusion	45
Appendix A	1a
Appendix B	5a

TABLE OF AUTHORITIES

Cases:

<i>Adams Express Co. v. Croninger</i> , 226 U.S. 491	20
<i>American Paper Institute, Inc. v. American Electric Power Service Corp.</i> , No. 82-34 (May 16, 1983)	20
<i>Blum v. Bacon</i> , 457 U.S. 132	39
<i>Boston Sand & Gravel Co. v. United States</i> , 278 U.S. 41	21
<i>Bread Political Action Committee v. FEC</i> , 455 U.S. 577	17
<i>Califano v. Yamasaki</i> , 442 U.S. 682	21
<i>California v. United States</i> , 438 U.S. 645	37
<i>Chapman v. El Paso Natural Gas Co.</i> , 204 F.2d 46..	34, 35
<i>Chemehuevi Tribe of Indians v. FPC</i> , 489 F.2d 1207, rev'd, 420 U.S. 395	13, 17, 18, 21, 22, 39
<i>Cherokee Nation v. Southern Kansas Ry.</i> , 135 U.S. 641	14
<i>Clark v. Uebersee Finanz-Korporation, A.G.</i> , 332 U.S. 480	20

Cases—Continued

Page

<i>Colorado-Wyoming Gas Co. v. FPC</i> , 324 U.S. 626..	41
<i>Dam at Lake Winnibigoshish</i> , 16 Atty. Gen. Op. 552	43
<i>Dawson Chemical Co. v. Rohm & Haas Co.</i> , 448 U.S. 176	17
<i>East Bay Municipal Utility District</i> , 1 F.P.C. 12....	37
<i>FEC v. Democratic Senatorial Campaign Committee</i> , 454 U.S. 27	39
<i>FPC v. Colorado Interstate Gas Co.</i> , 348 U.S. 492..	40
<i>FPC v. Idaho Power Co.</i> , 344 U.S. 17	13, 20, 41
<i>FPC v. Niagara Mohawk Power Co.</i> , 247 U.S. 239	37
<i>FPC v. Oregon</i> , 349 U.S. 435	13
<i>FPC v. Tuscarora Indian Nation</i> , 362 U.S. 99.....	13, 14, 38, 44
<i>FPC v. Union Electric Co.</i> , 381 U.S. 90	13
<i>First Iowa Hydro-Electric Cooperative v. FPC</i> , 328 U.S. 152	13, 21-22, 31, 37
<i>Flynt v. Ohio</i> , 451 U.S. 619	20
<i>Grand River Dam Authority v. FPC</i> , 246 F.2d 453..	44
<i>Greely v. Thompson</i> , 51 U.S. (10 How.) 225.....	20
<i>Grindstone Butte Project v. Kleppe</i> , 638 F.2d 100, cert. denied, 454 U.S. 965	34
<i>Howard C. Brown</i> , 73 Interior Dec. 172	35
<i>Kokoszka v. Belford</i> , 417 U.S. 642	18, 19
<i>Lac Courte, Oreilles Band of Lake Superior Chipewia Indians v. FPC</i> , 510 F.2d 198	18, 19
<i>Lake Ontario Land Development & Beach Protection Ass'n v. FPC</i> , 212 F.2d 227, cert. denied, 347 U.S. 1015	18
<i>Leiter Minerals, Inc. v. United States</i> , 352 U.S. 220	44
<i>Lemhi Indian Reservation</i> , 18 Atty. Gen. Op. 563..	43
<i>Metropolitan Edison Co. v. People Against Nuclear Energy</i> , No. 81-2399 (Apr. 19, 1983)	20
<i>Miller v. Youakim</i> , 440 U.S. 125	39
<i>Missouri, Kan. & Tex. Ry. v. Roberts</i> , 152 U.S. 114..	14
<i>Montana Power Co. v. FPC</i> , 459 F.2d 863, cert. denied, 408 U.S. 930	43
<i>NLRB v. Federbush Co.</i> , 121 F.2d 954	21
<i>Namekagon Hydro Co. v. FPC</i> , 216 F.2d 509	40

VI

Cases—Continued

Page

<i>Nevada v. United States</i> , No. 81-2245 (June 24, 1983)	14
<i>Niagara Falls Power Co.</i> , 6 F.P.C. 184	37
<i>Pacific Gas & Electric Co.</i> , 53 F.P.C. 523	33
<i>Pigeon River Lumber Co.</i> , 1 F.P.C. 206	33
<i>Power Authority</i> , 21 F.P.C. 146, on remand from sub nom. <i>Tuscarora Indian Nation v. FPC</i> , 265 F.2d 338, rev'd, 362 U.S. 99	31, 38
<i>Railroad Co. v. Hecht</i> , 95 U.S. 168	21
<i>Richards v. United States</i> , 369 U.S. 1	18
<i>Richbourg Motor Co. v. United States</i> , 281 U.S. 528	21
<i>Rumford Falls Power Co.</i> , 36 F.P.C. 605	37
<i>Scenic Hudson Preservation Conference v. FPC</i> , 453 F.2d 463, cert. denied, 407 U.S. 926	40
<i>Scenic Hudson Preservation Conference v. FPC</i> , 354 F.2d 608, cert. denied, 384 U.S. 941	40
<i>Seneca Nation of Indians</i> , 6 F.P.C. 1025	37
<i>Southern California Edison Co.</i> , 8 F.P.C. 364	33, 37
<i>Southern California Edison Co.</i> , 11 Fed. Power Svcs. (MB) 5-416	31
<i>Southern California Edison Co.</i> , 23 F.E.R.C. ¶ 61,240	37
<i>Southern Pacific Transportation Co. v. Watt</i> , 700 F.2d 550, cert. denied, No. 83-180 (Nov. 7, 1983)	28
<i>Trafficante v. Metropolitan Life Insurance Co.</i> , 409 U.S. 205	39
<i>United States v. Rodgers</i> , No. 81-1476 (May 3, 1983)	21
<i>United States v. Wittek</i> , 337 U.S. 346	44
<i>United States ex rel. Chapman v. FPC</i> , 345 U.S. 153	13
<i>Utah Power & Light Co. v. Morton</i> , 504 F.2d 728 ..	34, 35
<i>W.D. Lawson & Co. v. Penn Central</i> , 456 F.2d 419 ..	20
<i>Watt v. Alaska</i> , 451 U.S. 259	21
<i>Winters v. United States</i> , 207 U.S. 564	10
<i>Wisconsin Public Service Corp. v. FPC</i> , 147 F.2d 743, cert. denied, 325 U.S. 880	40

VII

Statutes:

Page

Act of Feb. 15, 1901, ch. 372, 31 Stat. 790, 43 U.S.C. 959	29, 35
Act of Mar. 4, 1911, ch. 238, 36 Stat. 1253, 43 U.S.C. 961	35
Act of Feb. 5, 1948, ch. 45, 62 Stat. 17, codified at 25 U.S.C. 323 <i>et seq.</i>	27-28
25 U.S.C. 323	28
25 U.S.C. 324	28
25 U.S.C. 326	28
Federal Power Act, 16 U.S.C. 791a <i>et seq.</i> :	
§ 3(2), 16 U.S.C. 796(2)	14, 37
§ 3(11), 16 U.S.C. 796(11)	18
§ 3(12), 16 U.S.C. 796(12)	18
§ 4, 16 U.S.C. 797	2
§ 4(e), 16 U.S.C. 797(e)	<i>passim</i>
§ 4(g), 16 U.S.C. 797(g)	6
§ 9(b), 16 U.S.C. 802(b)	31
§ 10(a), 16 U.S.C. 803(a)	10, 19
§ 10(e), 16 U.S.C. 803(e)	6, 9, 37
§ 10(i), 16 U.S.C. 803(i)	6
§ 14, 16 U.S.C. 807	7
§ 14(b), 16 U.S.C. 807(b)	7
§ 15, 16 U.S.C. 808	8
§ 15(a), 16 U.S.C. 808(a)	6
§ 15(b), 16 U.S.C. 808(b)	7
§ 27, 16 U.S.C. 821	31
§ 313(b), 16 U.S.C. 825l(b)	12, 40
Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 <i>et seq.</i> , codified at 16 U.S.C. 791a <i>et seq.</i>	6
General Dam Act, ch. 3508, 34 Stat. 386 <i>et seq.</i>	28
Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 25 U.S.C. 70 <i>et seq.</i>	5
Indian Reorganization Act § 16, 25 U.S.C. 476....	9, 12
Mineral Leasing Act of Feb. 25, 1920, ch. 85, 41 Stat. 437, 30 U.S.C. 185 <i>et seq.</i>	35
Mission Indian Relief Act of 1891, ch. 65, 26 Stat. 712 <i>et seq.</i>	4
§ 8, 26 Stat. 714	<i>passim</i>

VIII

Statutes—Continued

Page

Right of Way Act of Mar. 3, 1891, ch. 561, 26 Stat. 1101, 43 U.S.C. 946 <i>et seq.</i>	29
Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137, 25 U.S.C. 177	44
Trans-Alaskan Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576 <i>et seq.</i>	34
42 U.S.C. (Supp. V) 7172(a)	3
42 U.S.C. (Supp. V) 7295(b)	3
21 Stat. 197	28
23 Stat. 133	28
25 Stat. 425-426	28
26 Stat. 425, 454	28
27 Stat. 110	28
29 Stat. 120	28
30 Stat. 1151	28
36 Stat. 593	29

Miscellaneous:

22 Cong. Rec. 311 (1890)	44
51 Cong. Rec. (1914):	
p. 13701-13703	30
p. 14067	31
56 Cong. Rec. (1918):	
p. 9667	23
p. 9668	23
pp. 9668-9669	24
p. 10494	31
59 Cong. Rec. (1920):	
p. 1534	27
p. 1567	27
p. 1570	27
Federal Power Commission: Hearings on H.R. 11408 Before the House Comm. on Interstate and Foreign Commerce, 71st Cong., 2d Sess. (1930)	26, 42
Frison, Acquisition of Access Rights and Rights of Way on Fee, Public Domain, and Indian Lands, 10 Rocky Mnt. Min. L. Inst. 217 (1965)	29
H.R. 8716, 65th Cong., 2d Sess. (1918)	22

IX

Miscellaneous—Continued

	Page
H.R. Rep. 1299, 66th Cong., 2d Sess. (1921)	25
H.R. Rep. 910, 66th Cong., 2d Sess. (1920)	27
H.R. Rep. 61, 66th Cong., 1st Sess. (1919)	23
H.R. Rep. 842, 63d Cong., 2d Sess. (1914)	30
H.R. Rep. 3281, 50th Cong., 1st Sess. (1888)	43, 44
<i>Hearings Before the House Comm. on Water Power, 65th Cong., 2d Sess. (1918)</i>	23
18 Interior Dec. 168	30
31 Interior Dec. 13	29
<i>Investigation of Federal Regulations of Power: Hearings Pursuant to S. Res. 80 and S. 3619 Before the Senate Comm. on Interstate Commerce, 71st Cong., 2d Sess. (1930)</i>	25, 26
J. Kerwin, <i>Federal Water—Power Legislation</i> (1st AMS ed. 1968)	22, 28
J. Kinney, <i>Irrigation and Water Rights</i> (2d ed. 1912)	28
Lazarus, <i>Indian Rights Under the Federal Power Act</i> , 20 Fed. B.J. 217 (1960)	32
12 E. McQuillan, <i>Municipal Corporations</i> (3d rev. ed. 1970)	34
Note, <i>Tribal Consent and the Lease of Indian Lands for Federal Power Projects</i> , 59 Minn. L. Rev. 385 (1974)	31-32
Pinchot, <i>The Long Struggle for Effective Water Power Legislation</i> , 14 Geo. Wash. L. Rev. 9 (1945)	22
4 <i>Waters and Water Rights</i> (R. Clark ed. 1970)	28

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2056

ESCONDIDO MUTUAL WATER COMPANY, ET AL.,
PETITIONERS

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA AND
PALA BANDS OF MISSION INDIANS, ET AL.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE
FEDERAL ENERGY REGULATORY COMMISSION
URGING REVERSAL**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 692 F.2d 1223.¹ The court's order amending its opinion and denying rehearing and rehearing en banc (Pet. App. 31-41) is reported at 701 F.2d 826. The opinions of the Federal Energy

¹ "Pet. App." refers to the appendix to the petition for a writ of certiorari.

Regulatory Commission (Pet. App. 42-309, 310-378) are reported at 6 F.E.R.C. ¶ 61,189 and 9 F.E.R.C. ¶ 61,241. The decision of the administrative law judge (J.A. 243-368) is reported at 6 F.E.R.C. ¶ 63,008.²

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1982. The amended order denying rehearing and rehearing en banc was entered on March 17, 1983. A timely petition for a writ of certiorari was filed on June 15, 1983, and was granted on October 17, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 49 Stat. 860, 16 U.S.C. 825l(b).

STATUTES INVOLVED

Section 4 of the Federal Power Act (FPA or Act), 16 U.S.C. 797, provides in pertinent part:

The Commission is hereby authorized and empowered—

* * * *

(e) To issue licenses * * * for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reserva-

² "J.A." refers to the joint appendix filed with this Court in this case.

tions of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation * * *.

This and other pertinent statutory provisions are set forth in the Pet. App. 380-388.

STATEMENT

This case involves challenges to the statutory authority of the Commission³ to issue a new license to petitioners authorizing them to operate Hydroelectric Project 176, which crosses certain Mission Indian Reservations along the San Luis Rey River in Northern San Diego County, California, over the objections of the Mission Indian Bands (Bands) and the Secretary of the Interior (the Secretary or Interior).

A. Background: The Issuance Of The Original 50-Year License

The San Luis Rey River originates near the Palomar Mountains in northern San Diego County, California. In its natural condition, it flows through the

³ The term "Commission" refers to the Federal Power Commission prior to October 1, 1977, and to the Federal Energy Regulatory Commission thereafter. See 42 U.S.C. (Supp. V) 7172(a) and 7295(b).

Reservations of the La Jolla, Rincon, and Pala Bands of Mission Indians and then through the City of Oceanside on its way to the Pacific Ocean. Three other Mission Indian reservations—the Pauma, Yuima,⁴ and approximately three quarters of the San Pasqual—are also within its watershed. (A general map of the area is reproduced at Pet. App. 30, 308.) These six Indian Reservations were established pursuant to the Mission Indian Relief Act of 1891 (MIRA), ch. 65, 26 Stat. 712 *et seq.*⁵

Since 1895, the Escondido Mutual Water Company (Mutual) and its predecessor in interest⁶ have diverted the waters of the San Luis Rey River out of its watershed to the communities in and around the Cities of Vista and Escondido. The point of diversion is located within the La Jolla Indian Reservation upstream from the other reservations. The conveyance facility for the diverted water, known as the Escondido Canal, crosses parts of the La Jolla,

⁴ The two Yuima tracts are under the jurisdiction of the Pauma Band of Mission Indians. Consequently, while there are six Mission Indian Reservations, only five governing Indian Bands are involved in this case.

⁵ That Act called for the reservation land to be held in trust for 25 years followed by the issuance of fee patents. Trust patents were issued for the La Jolla and Rincon Reservations on September 13, 1892, for the Pala Reservation on February 10, 1893, and for the San Pasqual Reservation on July 1, 1910. The Pauma and Yuima Reservations were established in accordance with MIRA through the acquisition of quitclaim deeds by the United States. Subsequently, the 25 year trust period was extended indefinitely. See Interior's Brief on Appeal 17.

⁶ In 1905, following the failure of Mutual's predecessor, the Escondido Irrigation District, Mutual was organized to succeed to its interests (Pet. App. 51).

Rincon, and San Pasqual Indian Reservations. The canal terminates at Lake Wohlford, an artificial storage facility. Various agreements, dating back to 1894, among the Secretary of the Interior, the Mission Indian Bands whose lands the canal traverses, and Mutual and its predecessor purportedly granted Mutual and its predecessor rights-of-way across the Reservation lands for the Escondido Canal in return for supplying certain amounts of water to the Bands. Pet. App. 49-50.⁷

In 1915, Mutual constructed the Bear Valley powerhouse, which is located downstream from Lake Wohlford and which drains water from that lake. In 1916, Mutual also completed construction of the Rincon power house, which is located on the Rincon Reservation and which draws water from the Escondido Canal.

⁷ The validity of those agreements is the subject of separate proceedings instituted in 1969 by the Bands (subsequently joined by the United States) in the United States District Court for the Southern District of California. *Rincon Band of Mission Indians, et al. v. Escondido Mutual Water Co., et al.*, Nos. 69-217-S, 72-276-S & 72-271-S.

In their complaint in that case the Bands sought: (1) a declaratory judgment that the rights-of-way agreements are void; (2) an injunction prohibiting diversion of the waters of the San Luis Rey River into the Escondido Canal; and (3) substantial damages. On January 10, 1980, the district court entered an order granting partial summary judgment in favor of the Bands and voiding portions of the disputed contracts. The court of appeals refused to permit an interlocutory appeal of that order, and the case remains pending before the district court. Pet. App. 7.

In addition, the Bands have sued the United States pursuant to the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 25 U.S.C. 70 *et seq.*, for failure to protect their water rights. *Long v. United States*, Docket No. 80-A1 (Ct. Cl.). That proceeding is also presently pending.

In 1921, following enactment of the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 *et seq.* (now codified as Pt. I of the FPA, 16 U.S.C. 791a *et seq.*), Mutual applied to the Commission for a power license covering its hydroelectric facilities. In 1924, the Commission issued a 50 year license to Mutual⁸ covering the Escondido diversion dam and canal, Lake Wohlford, and the Rincon and Bear Valley powerhouses.

B. The Issuance Of The New License

1. In 1969 and 1970, the La Jolla, Rincon, and San Pasqual Bands and Interior filed complaints with the Commission, alleging that Mutual and the Vista Irrigation District (Vista)⁹ had violated the terms of Mutual's 1924 license. They sought, *inter alia*, increased annual payments¹⁰ to the Bands throughout the term of the 1924 license. In response, the Commission initiated an investigation pursuant to Section 4(g) of the FPA, 16 U.S.C. 797(g).

In April 1971, Mutual filed an application with the Commission, subsequently joined by the City of Escondido (Escondido), for a new minor hydroelectric license¹¹ for the project. In its application, Mutual

⁸ Mutual's license expired in 1974. Since then, it has operated the Project under annual licenses issued pursuant to Section 15(a) of the FPA, 16 U.S.C. 808(a).

⁹ Vista is the successor to the ownership and operation of Lake Henshaw, an artificial lake at the head of the San Luis Rey River. In 1922, a dam was constructed on Lake Henshaw to capture the headwaters of the San Luis Rey River.

¹⁰ Annual payments are the sums paid by a licensee for use of reservation lands pursuant to provisions of Section 10(e) of the FPA, 16 U.S.C. 808(e).

¹¹ Section 10(i) of the FPA, 16 U.S.C. 808(i), authorizes the Commission to issue a minor license for a complete project with not more than 2,000 horsepower capacity, *viz.* 1,500 kilowatts.

proposed to continue operating Project 176 as it had during the original license period.

In both May and October 1972, Interior requested the Commission to recommend federal takeover of Project 176 under Section 14 of the FPA, 16 U.S.C. 807, after expiration of the original license.¹² In June 1972, the La Jolla, Rincon, and San Pasqual Bands, acting pursuant to Section 15(b) of the FPA, 16 U.S.C. 808(b), applied for a non-power license under the supervision of Interior, to become effective when the original license expired.¹³

2. After lengthy hearings on the competing applications, the administrative law judge (ALJ) concluded that Project 176 satisfied Section 4(e) of the FPA, 16 U.S.C. 797(e), in that it did not interfere and was not inconsistent with the purpose for which the Mission Indian Reservations had been created or acquired (J.A. 303-308). He also concluded that it was "manifest [that] the conditions [which the Secretary of the Interior had proposed for inclusion in the new license pursuant to Section 4(e) of the Act] were designed not to improve the project but to destroy it" and that they amounted to "a Secretarial veto, made confessedly with total disdain for the survival of the project itself and for the law's standard of comprehensive development" (J.A. 300-301). The ALJ found, however, that Project 176 was not prop-

¹² Section 14(b) of the FPA, 16 U.S.C. 807(b), authorizes the Commission to recommend to Congress that the federal government take over a project once a license expires. If Congress passes legislation to that effect, the project is thereafter operated by the government.

¹³ Section 15(b) of the FPA, 16 U.S.C. 808(b), authorizes the Commission to grant a license to use a project as a "non-power" facility if it finds the project no longer is adapted to power production.

erly licensed since it was not constructed or operated primarily for the purpose of generating electricity (J.A. 357-368). On this basis, he ordered dismissal of Interior's complaint, the Vista investigation, and all license applications, including Interior's recapture proposal (J.A. 368).

3. The Commission reversed, holding that contrary to the view of the ALJ, Project 176 was subject to the Commission's licensing jurisdiction (Pet. App. 42-378).

With regard to the past operation of Project 176, the Commission found that Mutual had violated its license by permitting Vista's joint use of project facilities and by diverting water stored in the Lake Henshaw reservoir and pumped from that reservoir through the Escondido Canal (Pet. App. 226-232). Accordingly, it awarded readjusted annual charges to certain of the Bands (Pet. App. 231, 232-245).

Next, rejecting Interior's recommendation for federal takeover and the Bands' application for a non-power license, the Commission granted a new 30-year license for Project 176 to petitioners (Mutual, Escondido, and Vista ¹⁴), with certain conditions deemed necessary to protect the Reservations traversed by the project.¹⁵ At the same time, the Commission rejected

¹⁴ Although Vista had not applied for a license with Mutual and Escondido, the Commission determined that it should be made a joint licensee because its Henshaw facilities (see note 9, *supra*) are an integral part of the project (Pet. App. 80-86). Once the Commission decided to include Lake Henshaw and its facilities in the project license, it treated the proceedings as an application for an original license rather than as a relicensing pursuant to Section 15 of the FPA, 16 U.S.C. 808 (Pet. App. 133-137 & n.136).

¹⁵ The Commission required development of a permanent water operating plan (Pet. App. 173-190) and delivery of

the arguments of the Bands and Interior that for the Commission to make a lawful finding under Section 4(e) that a project will not interfere or be inconsistent with the purpose for which a Reservation was created or acquired, it had to obtain the "consent" of the Mission Indians pursuant to a variety of statutes, including Section 8 of the Mission Indian Relief Act of 1891, ch. 65, 26 Stat. 714, allegedly requiring specific Mission Indian consent for any use of Reservations lands (Pet. App. 137-142, 155-168).¹⁸

The Commission ruled further that it was not required to accept without modification conditions submitted by the Secretary under Section 4(e), which the Secretary deemed necessary for the "adequate protection and utilization" of the Reservation. Rather, in the Commission's view, a rule of reasonableness governed. Applying that standard, the Commission accepted some of the Secretary's Section 4(e) conditions, but rejected or modified others on the ground that they would prevent the Commission from fulfilling its licensing obligations under Section 4(e) (Pet. App. 143-155). The Commission thus refused to include a condition proposed by Interior that Mutual and Vista recognize the paramount right of the Bands to the waters of the San Luis Rey River. In the Commission's view, Interior's proposed water-

certain quantities of water to the LaJolla, Rincon, and San Pasqual Reservations for domestic, agricultural, and commercial uses (Pet. App. 187).

¹⁸ In addition to Section 8 of MIRA, 26 Stat. 714, the Bands asserted that the consent was required under Section 4(e) by virtue of Section 16 of the Indian Reorganization Act, 25 U.S.C. 476 and Section 10(e) of the FPA, 16 U.S.C. 803(e) (Pet. App. 137-142, 161-168).

rights condition was beyond the Commission's jurisdiction and would improperly infringe upon the authority of the district court which was adjudicating the Bands' identical water-rights claim under the *Winters* doctrine (*Winters v. United States*, 207 U.S. 564 (1908)) see page 5 note 7, *supra* (Pet. App. 148-159).¹⁷

Finally, noting that the outcome of the water rights litigation pending in district court might have a significant impact on the continued validity of the license (Pet. App. 187 n.192), the Commission directed that the license be modified "in any manner considered appropriate" after disposition of the water rights litigation (Pet. App. 259).

C. The Decision Of The Court Of Appeals

1. The court of appeals reversed the Commission's order issuing a license to petitioners and remanded the case to the Commission for further proceedings (Pet. App. 1-30).

At the outset, the court held that the Commission had reasonably construed the FPA as granting it licensing jurisdiction over all projects "for the development, transmission, and utilization of power" (16 U.S.C. 797(e)), even though the generation of power is not a significant aspect of the hydroelectric facility's purpose (Pet. App. 12-16).

The court ruled, however, that the interference/inconsistency clause of the Section 4(e) proviso requires the Commission to obtain Indian consent to a license before it can enter a finding that the issuance of a license will not interfere with "the purpose" for

¹⁷ This and the other conditions submitted by Interior which the Commission rejected (with the reasons for their rejection) are set out in App., *infra*, 5a-11a.

which an Indian Reservation was created or acquired (Pet. App. 17-22). The court therefore concluded that Section 8 of MIRA¹⁸ was applicable and that it required petitioners to obtain right-of-way permits from the LaJolla, Rincon, and San Pasqual Indians, as well as a hydroelectric license from the Commission before they could utilize the project facilities that occupy those Reservations (Pet. App. 21).

The majority further held that the Commission lacks authority to reject or modify any of the license conditions propounded by the Secretary pursuant to the second clause of the Section 4(e) proviso (Pet. App. 22-25). The court rejected the argument that its interpretation of Section 4(e) conflicts with the Commission's obligation under Section 10(a) of the FPA, 16 U.S.C. 803(a), to approve a project that will be the "best adapted to a comprehensive plan" for the utilization of waterways and the development of power (Pet. App. 23-24). The court also rejected the claim that its construction of Section 4(e) would give the Secretary an "unconditional veto power" over the licensing authority of the Commission, noting that any license issued by the Commission that includes conditions propounded by the Secretary would

¹⁸ Section 8 of MIRA of 1891, ch. 65, 26 Stat. 714, provides in pertinent part:

Subsequent to the issuance of any tribal patent or of any individual trust patent as provided in section five of this act, any citizen of the United States firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

be subject to judicial review pursuant to Section 313(b) of the FPA, 16 U.S.C. 825l(b) (Pet. App. 24-25).

Finally, the court held that the Commission is required to satisfy the limitations of the Section 4(e) proviso not only as to the three Reservations the Project traverses but to all six of the Mission Indian Reservations in the area (Pet. App. 25-26).

2. On petitions for rehearing, Judge Anderson dissented on these issues (Pet. App. 33-34). Noting that the FPA itself contains a pervasive scheme for obtaining rights-of-way over tribal lands and that the legislative history of the FPA shows that Congress rejected an amendment that would have required tribal consent before a license could be issued affecting tribal lands, Judge Anderson concluded that statutory provisions requiring Indian consent for the use of tribal lands, like Section 8 of MIRA, or Section 16 of the Indian Reorganization Act, 25 U.S.C. 476,¹⁹ cannot be considered as establishing that tribal consent is a prerequisite to use of Indian Reservation lands under hydroelectric licenses issued by the Commission (Pet. App. 34-39). Judge Anderson was of the further view that the Secretary's Section 4(e) conditions must be included in a license only to the extent they are "reasonable" and that under the statutory scheme the responsibility for making the initial reasonableness determination rests with the Commission, rather than Interior or a reviewing court (Pet. App. 40-41). On the facts, Judge

¹⁹ Since the majority found that Section 8 of MIRA had been violated, it did not reach the applicability of other statutes dealing with Indian consent. See page 9 note 16, *supra*.

Anderson concluded "that the FERC properly interpreted and applied § 4(e) and that all of its findings in that regard are supported by substantial evidence" (Pet. App. 41).

INTRODUCTION AND SUMMARY OF ARGUMENT

Certain settled propositions should be emphasized at the outset. First, it is beyond question that "[t]he Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960); accord *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 408 (1975); *FPC v. Union Electric Co.*, 381 U.S. 90, 98 (1965); *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 167-171 (1953); *FPC v. Idaho Power Co.*, 344 U.S. 17, 22-23 (1952); *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 180 (1946). It is also established that "[i]t is the Commission's judgment on which Congress has placed its reliance for control of licenses." *FPC v. Idaho Power Co.*, 344 U.S. at 20; see also *FPC v. Oregon*, 349 U.S. 435, 445-446 (1955); *United States ex rel. Chapman v. FPC*, 345 U.S. at 171. Moreover, it is equally firm doctrine that the power that Congress delegated the Commission to issue licenses "neither overlooks nor excludes Indians or lands owned or occupied by them" and that, therefore, the authority to license hydroelectric projects on Indian Reservation land applies even if Indian treaty obligations are thereby over-

ridden. *FPC v. Tuscarora Indian Nation*, 362 U.S. at 118, 121-124 (citing *Cherokee Nation v. Southern Kansas Ry.*, 135 U.S. 641, 656-657 (1890)) and *Missouri, Kan. & Tex. Ry. v. Roberts*, 152 U.S. 114, 116-118 (1894); see also, *Nevada v. United States*, No. 81-2245 (June 24, 1983), slip op. 30-31.

The issues presented in this case concern the proper application of these principles to the interpretation of the proviso in Section 4(e) of the FPA, which imposes special requirements in regard to licensing hydroelectric facilities on federal "reservations,"²⁰ including the lands held in trust for Indians by the United States. It is our submission that the holdings of the court below in response to these issues are clearly erroneous, for that court construed the Section 4(e) proviso as incorporating the very limitations on the Commission's licensing power that the Act was designed to preclude.

I

A. As we first show, the interpretation by the court below of the Section 4(e) proviso cannot be reconciled with the congressional intent. To begin with, the holding of the court below, subjecting the Commission's licensing authority to veto by the Secretary and the Bands, violates the settled principle that a proviso in a statute should not be construed to

²⁰ The FPA defines "reservations" as including "national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks." § 3(2), 16 U.S.C. 796(2).

destroy the very authority it qualifies. When read in context, the language and structure of Section 4(e) show that the proviso is solely concerned with evidence of significant physical disruption of the operation of a federal reservation and that the proviso's finding requirement and Interior's conditioning authority thereunder are necessarily limited to this practical concern.

We next demonstrate that our interpretation is reinforced by the legislative history of the FPA, which shows that the legislation was intended to centralize licensing authority in the Commission, grant the Commission the sole authority to make the interference/inconsistency finding, and subject Interior's conditioning power to a reasonableness standard under traditional principles relating to easements and rights of way.

B. The Commission's administrative decisions interpreting the Section 4(e) proviso are consistent with the legislative purpose.

1. Thus, the Commission has repeatedly interpreted the interference/inconsistency clause of the Section 4(e) proviso as requiring it to determine whether a hydroelectric facility will result in significant physical disruption of a reservation. In its view, the most important criterion for making that determination is the general impact of the physical aspects of the hydroelectric facility on the reservation. These are matters, moreover, which do not require tribal consent.

2. The Commission has also determined that it is not bound by Section 4(e) to adopt without question all conditions which the Secretary deems "necessary for the adequate protection and utilization of such reservations." Rather, as Judge Anderson found, the Commission is only required to adopt conditions pro-

posed by the Secretary of Interior that can "*reasonably* [be] deemed 'necessary for the adequate protection and utilization of such reservation'" (Pet. App. 41 (emphasis in original; citation omitted)). The Commission has therefore viewed the Secretary's conditioning authority as authorizing him to qualify the physical aspects of a hydroelectric facility in a reasonable manner in order to protect the Reservation from disruption.

C. Moreover, contrary to the view of the panel majority, it would significantly distort Section 4(e) to hold that its limitations are applicable to neighboring Reservations because their reserved water rights may be affected by the licensing of a hydroelectric facility. The plain statutory language and its history clearly show that the Commission lacks jurisdiction to determine title to land or water as part of its hydroelectric licensing authority. There is accordingly no basis for extending the limitations of Section 4(e) to neighboring Reservations on the premise that their water rights may be affected by the Commission's issuance of a license.

D. In light of all the circumstances, the Commission is entitled to deference in construing the statute which it has enforced for more than sixty years. Moreover, under traditional principles regarding judicial review of agency action the Commission should have the initial authority to determine whether the Secretary's conditions satisfy this reasonableness standard, subject to appellate court review.

II

Finally, even if, as the court below held, Section 4(e) requires that Section 8 of MIRA be satisfied as regards rights-of-way over Mission Indian lands, Sec-

tion 8 of MIRA does not have the effect the court below attributed to it. MIRA has no application to the authority of the Commission to grant rights-of-way for hydroelectric facilities under the FPA, in which Congress delegated to the Commission its sovereign authority to license use of public lands and Reservations of the United States.

ARGUMENT

I. THE COMMISSION, NOT THE BANDS OR INTERIOR, HAS THE ULTIMATE AUTHORITY TO DETERMINE WHETHER A HYDROELECTRIC LICENSE SHOULD ISSUE

A. The Language And History Of The Section 4(e) Proviso Make Clear That The FPA Grants Central Authority To The Commission To Exercise Licensing Authority, Not To The Bands Or Interior

1. Statutory Language

a. The Section 4(e) proviso, as all of Section 4(e), is framed in practical language.²¹ In the Commission's view, Congress meant by that language to assure that the licenses the Commission is authorized to issue will not result in major *physical* interference with the basic purpose for acquiring or creating the federal reservations on which the licenses are issued —i.e., their use as Indian homelands, military reservations, or national forests.²² The Section 4(e)

²¹ Statutory interpretation must, of course, begin " 'with the language of the statute itself.' " *Bread Political Action Committee v. FEC*, 455 U.S. 577, 580 (1982) (quoting *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187 (1980)); *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. at 400.

²² The practical and precise nature of this authority is illustrated by the terms of Section 4(e). Section 4(e) only authorizes the Commission to issue a license covering certain

proviso achieves this goal through the interplay of two clauses: the first requires a "finding" by the Commission that "no interference or inconsistency" will result from the issuance of the license; the second authorizes the Cabinet Secretary under whose supervision the Reservation falls to qualify the license with conditions "necessary for the adequate protection and utilization of such reservation."

Reading, as we must, these two clauses of the Section 4(e) proviso in conjunction with each other (e.g., *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974); *Richards v. United States*, 369 U.S. 1, 11 (1962)), it is apparent that the interference/inconsistency clause calls for a broad factual determination by the Commission that a hydroelectric facility will not fundamentally impinge upon the use of a Reservation, while the second clause authorizes a Cabinet Secretary to impose particularized requirements on the *physical aspects* of project facilities which he believes "necessary for the protection and use" of the Reservation. Nor is there any statutory reference to tribal consent as an essential prerequisite to the Commission's interference/inconsistency determination; indeed, the legislative history confirms beyond any doubt that Congress did not intend to create a requirement of tribal consent. See page 27, *infra*.²³

enumerated physical structures and "project works." "Project works" are defined as "the physical structures of a project" (§ 3(12), 16 U.S.C. 796(12)). See also § 3(11), 16 U.S.C. 796(11); *Chemehuevi Tribe of Indians*, 420 U.S. at 400-403; *Lake Ontario Land Development & Beach Protection Ass'n v. FPC*, 212 F.2d 227, 232 (D.C. Cir.), cert. denied, 347 U.S. 1015 (1954).

²³ In *Lac Courte, Oreilles Band of Lake Superior Chippewa Indians v. FPC*, 510 F.2d 198, 210 (D.C. Cir. 1975), relied

Moreover, the second clause of the Section 4(e) proviso cannot fairly be read as granting a Cabinet Secretary the authority to frustrate the Commission's "finding" by insisting upon the adoption of conditions asserted to be "necessary for the adequate protection and utilization of such reservation" even though the result of adopting such conditions would compel the Commission to exercise its licensing authority in a way which would exceed the mandate given to it by Congress and thus prevent it from issuing any license at all.²⁴

Under the interpretation of the majority below, however, such an incongruous result is possible since the greater power of the Commission is held hostage to the lesser power of Interior.²⁵ To be sure, condi-

upon by the court below, the majority indicated that the interference/inconsistency finding "can obviously only be made by ascertaining the rights confirmed upon the Band by the treaties establishing the reservation" (*id.* at 211). As the dissent in that case pointed out, however, the upshot of the majority's position is that, despite the comprehensive thrust of Part I of the Federal Power Act as applicable to Indian reservations, "no reservation lands could ever be used in power projects" (*id.* at 212).

²⁴ Our construction of the Section 4(e) proviso is further buttressed (see, *e.g.*, *Kokoszka v. Belford*, *supra*), by reference to the parallel proviso of Section 4(e) dealing with projects on navigable waters. That proviso requires a finding by the Commission that a license for facilities on navigable waters is desirable "in the public interest" for developing a waterway for the "use or benefit of * * * commerce" and additionally provides for approval by the Secretary of the War (now, Secretary of Army), under whose supervision navigable waters fall, of the "plans" for dams and structures affecting navigation.

²⁵ See Section 10(a) of the Act, 16 U.S.C. 803(a) (emphasis added), which provides that the project as adopted "shall be such as in the judgment of the Commission will be best

tions advanced by Interior are entitled to and are given great weight by the Commission, but to allow Interior full sway to veto the issuance of a license is to "attribute to Congress the intention * * * to open the door to * * * obvious incongruities and undesirable possibilities" (*Metropolitan Edison Co. v. People Against Nuclear Energy*, No. 81-2399 (Apr. 19, 1983), slip op. 7), and in the last analysis, to "paralyze with one hand what it sought to promote with the other." *American Paper Institute, Inc. v. American Electric Power Service Corp.*, No. 82-34 (May 16, 1983), slip op. 18 (quoting *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947)). Indeed, as this Court has made clear, a statutory exception or proviso should not be construed in such a manner as to undermine the very authority (here, the Commission's authority to issue a license) it was intended to qualify. *Adams Express Co. v. Croninger*, 226 U.S. 491, 507 (1913); *Greely v. Thompson*, 51 U.S. (10 How.) 225, 237 (1850); *W.D. Lawson & Co. v. Penn. Central*, 456 F.2d 419, 423 (6th Cir. 1972); see also *Flynt v. Ohio*, 451 U.S. 619, 622 (1981). But that is the very effect of the decision below.

b. In these circumstances, the majority's reliance upon the plain language rule does not advance its position. It is true that Section 4(e) provides that the license "shall" include the conditions which the Secretary deems necessary (see Pet. App. 23-24), but that

adapted to a comprehensive plan for improving or developing a waterway * * *; for the improvement and utilization of waterpower development, and for other beneficial public uses * * *; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works * * *"; see also, *FPC v. Idaho Power Co.*, 344 U.S. at 23.

does not end the inquiry. See *e.g.*, *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. at 403 (assertion based on literal language of Section 4(e) is refuted "when § 4(e) is read together with the rest of the Act, as of course, it must be"). Although "shall" is usually mandatory, it does not necessarily eliminate all discretion. *Califano v. Yamasaki*, 442 U.S. 682, 693-694 n.9 (1979); *Richbourg Motor Co. v. United States*, 281 U.S. 528 (1930); *Railroad Co. v. Hecht*, 95 U.S. 168 (1877).²⁸ Moreover, as this Court has made clear, the plain meaning rule is "'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (quoting *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.)); see also *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (Hand, J.). As we next show, "persuasive evidence" appears in the legislative history of the FPA.

2. Legislative History

There are at least three themes in the legislative history which strongly support our position here. First, that history makes clear that the fundamental purpose of the Act was to centralize authority in the Commission, "instead of the piecemeal, restrictive, negative approach of the Rivers and Harbors Acts and other federal laws previously enacted" (*First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. at

²⁸ Conversely, while the word "may" when used in a statute normally "implies some degree of discretion * * * [s]uch meaning can be defeated by indication of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute * * *." *United States v. Rodgers*, No. 81-1476 (May 8, 1983), slip op. 27.

180); second, the history underscores that tribal consent was not intended to be a prerequisite to the interference/inconsistency finding by the Commission; and, third, the legislative background points up that Congress was concerned with the exercise of the Commission's licensing authority in terms of the use and occupancy of Reservation land, thus invoking traditional concepts of limited conditioning authority relating to rights-of-way and easements.

a. The period of overlapping authority that existed prior to the passage of the Federal Water Power Act was marked by inefficiency, confusion, and very little hydroelectric development. See, e.g., J. Kerwin, *Federal Water—Power Legislation* 105-114 (1st AMS ed. 1968); Pinchot, *The Long Struggle for Effective Water Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945).

In 1918, a bill prepared by the Secretaries of War, Interior, and Agriculture at the direction of President Wilson was introduced in Congress, H.R. 8716, 65th Cong., 2d Sess. (1918). It was designed as a composite of the bills that had been introduced previously (J. Kerwin, *supra*, at 217-218),²⁷ and contained the language of the Section 4(e) proviso basically as it is now framed. The principal architect of this bill, O.C. Merrill, Chief of the Bureau of

²⁷ Between 1914 and 1917, four major bills antedating the 1918 bill had been introduced in Congress. Two chiefly concerned navigable waters and would have given the Secretary of War authority to issue licenses for projects (the Adamson Bill and the Shields Bill) and two chiefly concerned federal lands and would have vested the Secretary of the Interior with authority to issue licenses (the Ferris Bill and the Myers Bill). See *Chemehuevi Tribe of Indians v. FPC*, 489 F.2d 1207, 1220 n.61 (D.C. Cir. 1973), rev'd, 420 U.S. 395 (1975). For a further discussion of these bills see J. Kerwin, *supra*, at 172-216.

Engineers in the Department of Agriculture, explained that the purpose of the bill was to create a Commission consisting of the Secretaries of War, Interior, and Agriculture, "in order that whatever is done by existing agencies may be done under a consistent plan with a definite end in view, that there may be no duplication of work, overlapping of functions, or conflict of authority." *Hearings Before the House Comm. on Water Power*, 65th Cong., 2d Sess. (1918); accord H.R. Rep. 61, 66th Cong., 1st Sess. 5 (1919).²⁸

This aim was echoed in the House debates on the bill. As Congressman Ferris stated in regard to a proposal to add the word "respectively" to Section 2 of the bill, which provided that the "work of the commission shall, in so far as practicable, be performed by and through the Departments of War, Interior, and Agriculture" (56 Cong. Rec. 9667, 9668 (1918) (citation omitted)):

Let me reply to that for just a moment. Of course, I think the purpose of the bill is to have this subject covered under one comprehensive water-power policy, so that the applicant for a license or a modification of it will know where to go to, and will know where to go for the final

²⁸ As that House Report noted:

The bill . . . provides that the administration of water powers within Federal jurisdiction, which has hitherto been handled independently by three separate departments, shall be coordinated, through a commission composed of the heads of these departments, in order that duplication of work may be avoided, that a common policy may be pursued, and that the combined efforts of the three agencies may be directed toward a constructive national program of intelligent, economical utilization of our power resources.

word, and who is authorized to speak the final word. I think that in having a stool of three legs, if you must have the approval of each leg separately and respectively, you will never get anywhere. Personally I should like to see the action of that commission a single action, so that when action is taken, that will be the end of it. Our departments here are scattered all over town, and I do not know how other Members of the House have been impressed, but it certainly has been impressed on me when I go to transact a little business about the war or about the Navy or about any trivial thing that I start out in the morning and I wind up at night with some additional man yet to see. If this is intended to be a comprehensive measure—and I think it is, I think it is well conceived and well intended—we ought to make only one bite of a cherry.

And, in the ensuing debates, Congressman Raker, sponsor of the administration bill, similarly made clear that the proposed legislation sought to organize the Commission so that none of the three Secretaries could block the action of the other two (56 Cong. Rec. 9668-9669 (1918) (emphasis added)).²⁹

²⁹ The colloquy was as follows:

Mr. RAKER. There is no doubt on earth that if anyone reads this bill, if he has any other mind upon it, he has entirely misconceived the purpose of it. We have appointed a commission, and the mere fact that these three men are respectively the Cabinet officers and the Secretaries of the three departments does not affect their powers as commissioners under this bill, and the provision was inserted that they may go to these various departments and get their assistants.

Mr. WALSH. Well, I can not agree with the gentleman. Now, the gentleman says it does not affect their powers as Cabinet officers. I submit that under the au-

Indeed, once the bill passed Congress, the President withheld his signature because the Secretary of the Interior objected that the bill authorized the Commission to license projects on national parks and monuments (Reservations which fell under his supervision). Only after an agreement had been reached among the Secretary and members of Congress that Congress would pass legislation in its next session removing national parks and monuments from the scope of the Act, was the bill signed into law (H.R. Rep. 1299, 66th Cong., 2d Sess. 2 (1921)).

The legislative history of the 1930 amendment to the Act suggests further refinement of this purpose to centralize authority in one body. Thus, the aim of that amendment, the creation of a five member Commission appointed by the President, confirms that a Cabinet Secretary's authority to include conditions in a license was meant to qualify rather than control the Commission's licensing authority. That view was submitted by O. C. Merrill, who by that time was serving as the Secretary of the Commission.³⁰ In ad-

thority given this commission in this bill the Secretary of Agriculture, as the executive head of that department, can not block a project upon which the other two commissioners have agreed.

Mr. RAKER. Why, it requires a vote of two of them.

Mr. WALSH. Surely; two.

Mr. RAKER. And one can not defeat it.

Mr. WALSH. The Department of War and the Department of the Interior can adopt a project even if the Secretary of Agriculture opposes it.

³⁰ Mr. Merrill stated (*Investigation of Federal Regulations of Power: Hearings Pursuant to S. Res. 80 and S. 3619 Before the Senate Comm. on Interstate Commerce, 71st Cong., 2d Sess. 280-281 (1930) (emphasis added)*):

In my opinion the best way to maintain the jurisdiction and interests of the three departments is to have the field

dition, James Lawson, then Acting Chief Counsel of the Commission, who had been with the Commission since its creation, was equally clear that the Commission, not any Cabinet Secretary, was meant to possess the ultimate authority to decide whether a license should issue, explaining (*Investigation of Federal Regulations of Power: Hearings Pursuant to S. Res. 80 and S. 3619 Before the Senate Comm. on Interstate Commerce, 71st Cong., 2d Sess. 358 (1930)*): "[t]he Commission now has power to overrule the head of the department as to the consistency of a license with the purpose of any reservation." Secretary of the Interior Wilbur, agreed, stating, *inter alia*,

I cannot conceive of this Federal Power Commission really being effective unless it controls all power sites where it grants licenses, for if you have to ask the permission of this department or that department, there will be difficulties that will be absolutely impossible to overcome.

Federal Power Commission: Hearings on H.R. 11408 Before the House Comm. on Interstate and Foreign Commerce, 71st Cong., 2d Sess. 47-49 (1930).

work in so far as it relates to the issuance of licenses, originally handled as it has been ever since I have been with the Federal Power Commission, through the departments, leaving the final decision to the Federal Power Commission. But the three departments have no final say in those matters.

* * * * *

The Agricultural Department in such cases is cooperating with this new commission, and its officers are making reports upon certain projects, with recommendations to the Federal Power Commission. But there is where the responsibility ends. *The decision rests with the Federal Power Commission.*

In sum, this legislative history is at odds with any suggestion that Section 4(e) was meant to vest each of the three Cabinet Secretaries with absolute authority to foreclose the issuance of a license on Reservation lands under his supervision.

b. The legislative history also puts to rest the argument, adopted by the court below, that Congress intended the interference/inconsistency clause of the Section 4(e) proviso to subject the Commission's authority to issue a license for a hydroelectric facility on an Indian Reservation to tribal veto. During final Senate debate on the Administration bill Senator Nugent of Idaho proposed an amendment to Section 4(e) (then Section 4(d) of the bill) which would have required such consent (59 Cong. Rec. 1534 (1920)). Although doubt was expressed about the wisdom of granting an Indian tribe an "absolute veto" over a project for hydroelectric development (*id.* at 1567), the Senate adopted the proposed amendment (*id.* at 1570). House and Senate conferees, however, thereafter struck the amendment, observing that they saw "no reason why water-power should be singled out from all other uses of Indian reservation land for special action of the counsel of the tribe" (H.R. Rep. 910, 66th Cong., 2d Sess. 8 (1920)); and the bill passed without the amendment.

As Judge Anderson observed in his dissent below, this definitive expression of congressional intent is fundamentally irreconcilable with the opinion of the Ninth Circuit in this case that tribal consent is essential before a project may lawfully be licensed (Pet. App. 37). Moreover, subsequent legislation shows that Congress has never deviated from its basic position on this point.³¹

³¹ Rights-of-way and easements across Indian lands are now generally governed by the Act of Feb. 5, 1948, ch. 45, 62

c. It is also manifest from the legislative history that Congress intended the FPA to focus on practical land use issues in determining whether to use federal lands for the construction and operation of hydroelectric facilities.

Prior to the 1920 Act, the Secretaries of Interior, War, and Agriculture had authority to issue licenses for hydroelectric projects on lands under their supervision pursuant to a series of statutes authorizing them to grant rights-of-way across federal lands. See J. Kerwin, *supra*, at 105-114; 4 *Waters and Water Rights* § 330 (R. Clark ed. 1970), 2 C. Kinney, *Irrigation and Water Rights* §§ 927-971 (2d ed. 1912). These early Acts, on which the FPA was based, ordinarily contained provisos, similar to the proviso in Section 4(e) of the FPA, designed to protect public lands or reservations from physical disruption by the granting of any right-of-way on them.²²

Stat. 17, codified at 25 U.S.C. 323 *et seq.* That Act authorizes the Secretary of the Interior to grant rights-of-way for all purposes across Indian lands held in trust by the United States "subject to such conditions as he may prescribe" (25 U.S.C. 323), and additionally requires the consent of the tribal officials or individual Indians of the Reservation. 25 U.S.C. 324. See generally *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550, 552-554 (9th Cir. 1983), cert. denied, No. 83-180 (Nov. 7, 1983). That Act, however, specifically exempts the provisions of the Federal Water Power Act, as amended, from its operation. 25 U.S.C. 326.

²² A parallel series of statutes dealing with construction of dams and other structures in navigable waters evolved simultaneously. See The Rivers and Harbors Acts of 1880 (21 Stat. 197), 1884 (23 Stat. 133), 1888 (25 Stat. 425-426), 1890 (26 Stat. 425, 454), 1892 (27 Stat. 110), 1896 (29 Stat. 120) and 1899 (30 Stat. 1151). In 1906, Congress promulgated the General Dam Act, ch. 3508, 34 Stat. 386 *et seq.*, requiring

The two most important of those statutes for purposes of licensing hydroelectric facilities were the Right of Way Act of Mar. 3, 1891, ch. 561, 26 Stat. 1101, 43 U.S.C. 946 *et seq.* and the Act of Feb. 15, 1901, ch. 372, 31 Stat. 790, 43 U.S.C. 959.³³ The provisos in the sections of these Acts authorizing the issuance of rights-of-way reflected the established legal principle that an easement or right-of-way should be operated in such a manner as to minimize interference with the owner's occupation and use of his estate and may be expressly conditioned for that purpose. See generally, Frison, *Acquisition of Access Rights and Rights of Way on Fee, Public Domain, and Indian Lands*, 10 Rocky Mtn. Min. L. Inst. 217 (1965).³⁴ The fact that these concepts were carried

approval by the Secretary of War and Chief of Engineers for any construction in navigable waters. The Act authorized those two officials to impose conditions on such construction "necessary to protect the navigability" of the affected waterway. This Act was further amended in 1910 (36 Stat. 593), to authorize permits for up to 50 years following consideration by the Secretary of War and Chief of Engineers of the impact of the project on a "comprehensive plan" for development of the waterway "with a view to the protection of its navigable quality."

³³ The relevant portions of these Acts, as amended in 1896 and 1911, are set forth in App., *infra*, 1a-4a.

³⁴ Thus, the regulations promulgated by the Secretary of the Interior under the Act of Feb. 15, 1901, show that the Act was concerned with the physical protection of reservations (31 Interior Dec. 13, 15).

Whenever a right of way is located upon a reservation, the applicant must file a certificate to the effect that the right of way is not so located as to interfere with the proper occupation of the reservation by the government, and, when located upon any of their national parks designated in the act, the applicant must show to the satisfac-

over into the FPA is crucial since it underscores that Congress was focusing on practical concerns regarding the general physical use of Reservations, not broad concepts of Indian sovereignty or title to water.

Thus, as Congressman Ferris explained, it would be necessary to be "practical" in applying the proviso for the protection of Reservations in the bill he was proposing³⁵ and that where a hydroelectric facility would only occupy "the corner" of a large Reservation the issuance of a license would clearly be proper. 51 Cong. Rec. 13701-13703 (1914). It was entirely consistent with this practical approach that the 1920 Act made plain beyond any doubt that the Commission's licensing authority related solely to land use and

tion of the Department that the location and use of the right of way for the purposes contemplated will not interfere with the uses and purposes for which the park was originally dedicated and will not result in damage or injury to the natural conditions of property or scenery existing therein.

See also, the 1894 Interior circular explaining that under the 1891 Act "control of the flow and use of water is * * * a matter exclusively under State or Territorial control, the matter of administration within the jurisdiction of this Department being limited to the approval of maps carrying the right of way over public lands." 18 Interior Dec. 168, 169-170 (1894).

³⁵ The proviso in the Ferris Bill (the chief public lands bill which preceded the Wilson Administration Bill), provided that a license could be issued by the Secretary of the Interior on or through a federal Reservation only upon a "finding by the chief officer of the department under whose supervision such reservation falls, that the lease will not destroy, materially injure, or be inconsistent with the purpose which such forest, national monument, or reservation was created or acquired." H.R. Rep. 842, 63d Cong., 2d Sess. 2 (1914).

not to broad questions of Indian sovereignty or water rights.³⁶

B. The Commission's Approach In This Case Is Faithful To The Legal Principles Which Evolved From The Legislative Background

1. The Interference/Inconsistency Finding Basically Refers To Uses Of Land, Not Title To Water Or Indian Sovereignty

Consonant with the purpose of the 1920 legislation, the Commission has consistently taken the position that the most important criterion for determining whether a project will interfere or be inconsistent with the purpose for which a Reservation was created or acquired is the amount of Reservation land the hydroelectric facility will occupy. *Southern California Edison Co.*, 11 Fed. Power Svcs. (MB) 5-416, 5-425-427 (1977); *Power Authority*, 21 F.P.C. 146 (1959), on remand from *sub nom. Tuscarora Indian Nation v. FPC*, 265 F.2d 338 (D.C. Cir. 1958), rev'd, 362 U.S. 99 (1960); Note, *Tribal Consent and the Lease*

³⁶ As Senator Myers explained in the final debates on the Wilson Administration water-power bill (56 Cong. Rec. 10494 (1918)):

I believe it is the intention of the bill, as it was bills that emanated in times past from the Public Lands Committee of the Senate, merely to control, regulate, and dispose of the use of the public lands through which the water flows. It is not intended to interfere with the ownership and control by the State of those waters.

See also the statement of Congressman Taylor noting that he had incorporated Section 8 of the Reclamation Act into Section 14 of the Ferris bill to foreclose the Commission from exercising jurisdiction over water rights (51 Cong. Rec. 14067 (1914)) and see Sections 9(b) and 27 of the FPA, 16 U.S.C. 802(b) and 821; *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. at 176 n.20.

of *Indian Lands for Federal Power Projects*, 59 Minn. L. Rev. 385, 416 n.165 (1974).³⁷ If, as here, the facility occupies only a small fraction of the Reservation lands and otherwise will not have a disruptive impact on the Indians' use of their Reservation the Commission considers that it is reasonable to find that the interference/inconsistency clause of the Section 4(e) proviso has been satisfied.³⁸ At the same time, this focus on land use and not Indian "sovereignty" or title to water underscores that Section 4(e) does not require tribal consent to the is-

³⁷ Thus as one commentator has observed:

Water conduits, transmission lines, power houses, and access roads * * * are examples of project works which usually do not require a material amount of land, which create relatively negligible interference with the use of property and thus which conceivably can be found consistent with the purpose for which an Indian reservation was established. * * *

Indian rights under the first proviso of Section 4(e) thus may be said to turn in the first instance upon a *de minimis* rule. If the proposed project facility will not require a material amount of tribal land and will not cause a significant disruption in the present or prospective mode of living of the Indian owners and occupants of the reservation, then the license may issue.

Lazarus, *Indian Rights Under the Federal Power Act*, 20 Fed. B.J. 217, 220-221 (1960).

³⁸ As the Commission observed in this case, the project occupies 26.77 acres (0.3%) of the La Jolla Reservation; 27.87 (0.7%) of the Rincon Reservation; and 37.38 acres (2.6%) of the San Pasqual Reservation (Pet. App. 138 n.138). Once the Escondido Canal is rerouted and placed underground, as ordered by the Commission, the usage of San Pasqual Reservation lands will drop to 18.28 acres (1.3%). Moreover, both the La Jolla and Rincon Reservations are located in mountainous terrain with very limited uses (*ibid.*).

suance of a license by the Commission for a project on an Indian Reservation.

2. Interior's Exercise Of Its Section 4(e) Conditioning Power Must Be Reasonable

Also in accord with the legislative background, the Commission has consistently construed the conditioning clause of Section 4(e) as requiring it to adopt only those conditions proposed by a Cabinet Secretary for inclusion in a license issued for a project on a Reservation under his supervision which are reasonably related to protection of the Reservation from undue disruption by the physical aspects of the construction and operation of the project. In accordance with this view, Section 4(e) requires the Commission only to adopt conditions proposed by a Cabinet Secretary "necessary for the adequate protection and utilization of such reservation" that are "reasonable" and "in the public interest." *Pigeon River Lumber Co.*, 1 F.P.C. 206, 209 (1935); accord, *Southern California Edison Co.*, 8 F.P.C. 364, 386 (1949) ("conditions is appropriate"). Thus, as already noted, while the Commission "gives great weight to the judgment and recommendations of the Department * * *, the Commission nevertheless must act on the basis of the record as a whole and must exercise its judgment to insure that the project * * * meets the requirement of Section 10(a) of the Act [requiring that the license be best adapted for a comprehensive plan for the improvement and use of water-power development]." *Pacific Gas & Electric Co.*, 58 F.P.C. 523, 526 (1975).

This interpretation has its roots in the settled law which the 1920 Act perpetuated.²⁰ It is thus well es-

²⁰ Indeed, the conditioning authority of the Secretary under Section 4(e), which is limited to conditions "necessary for

established that the authority to impose conditions on a right-of-way allows the party exercising the conditioning authority to impose only "reasonable terms and conditions." *Grindstone Butte Project v. Kleppe*, 638 F.2d 100 (9th Cir.), cert. denied, 454 U.S. 965 (1981) (dealing with the authority of the Secretary of the Interior to condition rights-of-way under the Act of 1891); 12 E. McQuillan, *Municipal Corporations* § 34.36 (3d rev. ed. 1970) (if municipal consent is required for a public right-of-way a municipality may impose only "reasonable conditions" on its consent to bind the user of the right-of-way). Accordingly, the Commission acted well within its authority when it refused in this case to adopt the condition proposed by the Secretary of the Interior relating to the Bands' water rights—a result which would have required the Commission to act outside of its authority and invade the province of the district court presently exercising jurisdiction over that claim. See App., *infra*, 6a.⁴⁰

the *protection and use*" (emphasis added) of Reservations is actually more circumscribed than the conditioning authority in the right-of-way statutes which preceded it. Not long ago Congress considered an amendment to the Trans-Alaskan Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576 *et seq.*, to prevent any abuse of the broad discretion provided by that legislation to the Secretary of the Interior based on its concern that the Secretary might attempt to implement policy not specifically authorized by Congress by "imposing by indirection any type of condition on federal rights-of-way not expressly authorized by statute." Thus, in its proposed amendment it employed language focusing on "*protection and use of the public lands*" (emphasis added); such language is similar to that found in the Section 4(e) proviso (*Utah Power & Light Co. v. Morton*, 504 F.2d 728, 735-736 n.6 (9th Cir. 1974)).

⁴⁰ The instant case is thus similar to *Chapman v. El Paso Natural Gas Co.*, 204 F.2d 46 (D.C. Cir. 1953). There the Sec-

Indeed, the Department of the Interior itself has recognized the limitation of its own conditioning power under the Act of Feb. 15, 1901, whenever water rights issues are involved. See *Howard C. Brown*, 73 Interior Dec. 172 (1966), where the Department observed in pertinent part (*id.* at 175-178):

The Department has long held that questions involving the control and appropriation of the waters of a State cannot be adjudicated under an application for right-of-way privileges over the public land. *Surface Creek Ditch and Reservoir Co.*, 22 L.D. 709 (1896). Despite his assertions to the contrary, this is precisely what the appel-

retary of the Interior sought to impose a condition under the Mineral Leasing Act of Feb. 25, 1920, ch. 85, 41 Stat. 437, 30 U.S.C. 185 *et seq.*, on a right-of-way for a natural gas pipeline that would have required the pipeline to operate as a common carrier. The District of Columbia Circuit rejected the proposed common-carrier conditions, concluding that the Act only allowed the Secretary to condition the "physical aspects" of the right-of-way and that the Act barred him from conditioning the "operation" of the pipeline, which the court held was a regulatory matter vested in the Federal Power Commission. *Chapman v. El Paso Natural Gas Co.*, 204 F.2d at 51.

Utah Power & Light Co. v. Morton, 504 F.2d 728 (1974) is not to the contrary. There the Ninth Circuit held that the Secretary of the Interior could impose a wheeling requirement on the grant of a right-of-way issued pursuant to the Act of Feb. 15, 1901, ch. 372, 31 Stat. 790, 43 U.S.C. 959, and Act of Mar. 4, 1911, ch. 238, 36 Stat. 1253, 43 U.S.C. 961, for non-primary transmission lines. The Ninth Circuit observed that the legislative history of the 1901 Act suggested that the authority granted the Secretary under the Act to impose conditions was intended to protect public lands from "interference or abuse" (504 F.2d at 734), and affirmed the use of the condition on the ground that it was not "unreasonable in its context" (*id.* at 735) and did not violate any regulatory jurisdiction vested in the Federal Power Commission.

lant is asking the department to do, for, aside from the question of the right to appropriate water, he has not suggested in what way the approval of Kaiser's right-of-way application might be contrary to the public interest.

* * * * *

In effect, then, appellant is seeking to have the Department do indirectly—by denial of the right-of-way application—what appellant can do directly in the State courts. This points up rather sharply that the basic issue is one of water rights, which the Department refuses to adjudicate.

In sum, it is plain that Interior's conditions under Section 4(e) must relate to the express concerns—principally land use—flowing from the physical project; they must be reasonable in dealing with those interests; and they cannot decide issues as to title to water over which the Commission has no jurisdiction. The Commission properly applied these principles to this case.

C. The Requirements Of Section 4(e) Do Not Extend To The Three Mission Indian Reservations Whose Lands Are Not Utilized For This Hydroelectric Project

The further ruling of the court below, that the Section 4(e) proviso reaches an Indian Reservation even though the hydroelectric project does not physically traverse it, rests on the notion that the Reservation is affected within the meaning of Section 4(e) so long as the project affects its use of water. This conclusion is also wholly refuted by Section 4(e)'s text and its history.

Section 4(e) refers to the issuance of a license "*within any reservation*" only after a finding that the

license will not interfere with the "purpose for which *such* reservation was created or acquired" (emphasis added). Moreover, "reservation" is defined in Section 3(2) as "*tribal lands* within Indian reservations," and Section 10(e) provides for annual charges for the use of "*tribal lands* embraced within Indian reservations" (emphasis added). On its face, therefore, Section 4(e) requires that the conditions proposed by Interior for Reservations relate to the specific Reservation *within* which the license is to be issued, not other Reservations which may somehow be "affected" by the project as the Bands and Interior contend.

As we have already noted, the legislative history establishes unequivocally that the Commission, as it held in this case, lacks jurisdiction to decide title to water as part of its licensing authority.⁴¹ Accordingly, on this issue too the weight of authority is

⁴¹ Indeed, the Commission has consistently so maintained. *Southern California Edison Co.*, 23 F.E.R.C. ¶ 61,240 (1983), appeal pending *sub. nom. Aqua Caliente Band of Cahuilla Indians v. FERC*, No. 83-7708 (9th Cir.); *Rumford Falls Power Co.*, 36 F.P.C. 605, 607 (1966); *Seneca Nation of Indians*, 6 F.P.C. 1025, 1026 (1947); *East Bay Municipal Utility District*, 1 F.P.C. 12 (1932). Instead, it considers its authority is limited to authorizing the "use" of water to generate electric power. *Southern California Edison Co.*, 8 F.P.C. 364, 384 (1949); *Niagara Falls Power Co.*, 6 F.P.C. 184 (1947).

This Court has recognized the correctness of this determination. *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 175-176 & n.20 (1946); *FPC v. Niagara Mohawk Power Corp.*, 247 U.S. 239, 246-247 (1954). See also *California v. United States*, 438 U.S. 645, 660-662 & n.16 (1978), where this Court made clear that statutory right-of-way provisions which were precursors to the FPA do not deal with title to water.

flatly inconsistent with the ruling of the court below that the limitations of the Section 4(e) proviso must be extended to neighboring Reservations because their reserved water rights may be affected by the issuance of a Commission license.⁴²

Indeed, this Court has already rejected a similar claim. In *Tuscarora*, the court of appeals had held that the federal interest in protecting the Indians against improper alienation of their lands was a sufficient "interest in land" under Section 3(2) of the Act to bring the Tuscarora Reservations (which were held in fee) within the requirements of the Section 4(e) proviso, *Tuscarora Indian Nation v. FPC*, 265 F.2d 338, 341-343 (D.C. Cir. 1958), rev'd, 362 U.S. 99 (1960). This Court reversed, concluding that the term "reservations" in Section 3(2) of the FPA could not be construed to incorporate such comprehensive and abstract considerations as "[t]he national 'interest' in Indian welfare and protection" but that instead Congress has concerned itself only with structures, lands, and interests in lands owned by the United States, when it promulgated the Act. *FPC v. Tuscarora Indian Nation*, 362 U.S. at 114-115. It is likewise true here that Section 4(e) cannot be read to incorporate within the Commission's licensing jurisdiction questions of Indian title to reserved water when Congress explicitly excluded such questions from the purview of the Commission's jurisdiction.

⁴² Interior admits that many of the conditions it proposes are designed to protect the three Mission Indians Reservations that are not occupied by Project No. 176 (Interior's Brief on Appeal 86). Nevertheless, as the Commission observed (Pet. App. 148), the Bands and Interior have also acknowledged that the Commission lacks jurisdiction to resolve the water-rights controversy pending in district court.

D. Against This Background Considerations Of Deference And Traditional Rules Governing Judicial Review Of Agency Action Require Affirmance Of The Commission's Interpretation Of The Section 4(e) Conditioning Power

In light of the foregoing background, settled principles underlying judicial review of agency action fully justify reversal of the decision below.

1. It is the settled rule that deference should be given to an agency's longstanding interpretation of the statute which it enforces. *Blum v. Bacon*, 457 U.S. 132, 142 (1982); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972). Under this standard, the Commission's interpretation should be followed unless there are compelling indications that it is wrong. *Miller v. Youakim*, 440 U.S. 125, 144 (1979). A court need not find that this "construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981). Instead, the "narrower inquiry [is] whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court" (*ibid.*). Deference is particularly due where, as here, the construction by the administrative agency gives effect to the congressional intent. *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. at 409-410.

2. Another firm precept of administrative law is also applicable here. If, as all the parties appear to agree, the Secretary's conditions must be "reasonable," then it follows, as Judge Anderson stated in his dissent, that the Commission should determine in the first instance whether the Secretary's proposed conditions satisfy the "reasonableness" standard. Any other approach, in our view, would be wholly

inconsistent with traditional principles of judicial review of administrative action, under which Commission licensing orders are reviewable to determine whether they have a reasonable basis in law and are supported by substantial evidence. *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972); *Namekagon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954); *Wisconsin Public Service Corp. v. FPC*, 147 F.2d 743 (7th Cir.), cert. denied, 325 U.S. 880 (1945).

Review under Section 313(b) of the FPA, 16 U.S.C. 835l(b), is thus predicated upon the determination of all fact questions by the Commission in the first instance. When the Commission includes in a license conditions proposed by the Secretary of the Interior pursuant to Section 4(e), the conditions become an integral part of the Commission's license and are reviewable on appeal. Similarly, when the Commission rejects conditions as unreasonably related to the need for the adequate protection and utilization of a Reservation, its findings are also subject to appellate review. An appellate court in reviewing the Commission finding is thereby afforded the benefit of the Commission's technical knowledge and experience. See *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 501 (1955); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966) ("the Commission has an affirmative duty to inquire into and consider" all facts relevant to the decisionmaking standards imposed by the statutory scheme). As Judge Anderson explained in his dissent, "this procedure would preserve the control of FERC over licensing and at the same time respect the Secretary's statutory duty to protect the reservations" (Pet. App. 41).

These fundamental considerations are reflected in this Court's decision in *FPC v. Idaho Power Co.*, *supra*. There the Commission included conditions suggested by the Secretary of the Interior in a license it issued; and Idaho Power Company sought review, alleging that the Commission lacked authority to attach the conditions (344 U.S. at 19). The court of appeals agreed and entered a judgment which modified the license by striking the illegal condition (*id.* at 20). This Court reversed, holding the power of the court of appeals "to affirm, modify, or set aside" a Commission order in "whole or in part" does not authorize the Court to exercise "an essentially administrative function" (*id.* at 20-21). Thus *Idaho Power* stands for the proposition that it is the Commission's judgment on which Congress has placed its reliance for control of licenses" and that a court of appeals "usurps" that authority when it modifies a license by striking a condition (*ibid.*). It follows that the Commission must have the opportunity to fashion appropriate licenses even when conditions proposed by the Secretary of the Interior are involved and that only after Commission action is judicial review available.

The decision of the Ninth Circuit in this case skews that balanced resolution by limiting the Commission to deciding whether to issue a license with the conditions as proposed by a Cabinet Secretary or to issue no license at all. As we have shown, that result deprives the Commission of a great part of its administrative responsibilities under Section 4(e) and courts of appeals of the very administrative findings which they must review. See *Colorado-Wyoming Gas Co. v. FPC*, 324 U.S. 626, 634 (1945). At the same time, it places the administrative function improperly in the court of appeals. *Idaho Power Co.*, 344 U.S. at 21.

As the Secretary of the Interior testified at the 1930 hearings to amend the FPA,⁴⁸ the proper procedure is for any of the three Cabinet Officers to participate in hearings before the Commission and appeal the orders of the Commission to the court of appeals. Indeed, it was that approach which the United States Court of Appeals for the District of Columbia Circuit approved in a similar context:

The Court is not without jurisdiction, as seems to be suggested by the Company, relying on the provision of Section 10(e) that the annual charges must be approved by the Secretary of the Interior * * *.

The Secretary is a public figure who could not insist on withholding approval unless the rental rate to be paid were unreasonable. Considering the applicable statutes together he may approve a rental offered by the Company, and he may negotiate for an approved consensual arrangement; but if there is no agreement and the matter goes to the Commission, the Secretary can refuse to approve the rate fixed by the Commission only by seeking court review of its determination. As is the situation with the Tribes, the

⁴⁸ The Secretary stated (*Federal Power Commission: Hearings on H.R. 11408 Before the House Comm. on Interstate and Foreign Commerce, 71st Cong., 2d Sess. 47-49 (1930)*):

I agree with Secretary [of Agriculture] Hyde that we can well allow these departments to be represented at hearings before the Commission to present phases of departmental interests, rather than to have the control remain in the departments. Otherwise, even though you set up the Commission, you will leave in the hands of the Bureau heads, the power to negate whatever the Commission may want to do, that is, to ask the consent of the department involved.

Secretary can participate as a party and avail of the provisions for judicial review.

Montana Power Co. v. FPC, 459 F.2d 863, 873-874 (D.C. Cir.), cert. denied, 408 U.S. 930 (1972). The same principle should govern here.

II. IN ANY EVENT, CONTRARY TO THE RULING BELOW, SECTION 8 OF MIRA DOES NOT BAR THE COMMISSION FROM ISSUING A LICENSE WITHOUT THE CONSENT OF THE BANDS

As we have shown, the legislative history and relevant case law establish that Section 4(e) is a comprehensive and self-contained provision which was not intended to subject the Commission's licensing authority to Indian tribal consent. At all events, the court's view of the impact of MIRA on the Commission's licensing power was plainly incorrect. The legislative history of MIRA shows that Section 8 relates to acquisition of rights-of-way over Mission Indian lands by *private* individuals, not actions like those involved here which involve the Commission's granting of licenses for the use of Reservation lands pursuant to sovereign powers delegated to it by Congress.

Just prior to passage of MIRA, several irrigation companies were seeking rights-of-way across Indian land. The Department of the Interior believed that irrigation ditches and flumes would benefit both the settlers and the Mission Indian Bands, whose Reservations were situated in desert country. H.R. Rep. 3281, 50th Cong., 1st Sess. 12-13 (1888). However, in light of two Attorney General opinions that only Congress could authorize alienation of Indian lands,⁴⁴

⁴⁴ *Dam at Lake Winnibigoshish*, 16 Atty. Gen. Op. 552 (1880); *Lemhi Indian Reservation*, 18 Atty. Gen. Op. 563

Interior recognized that it lacked authority to approve private contracts for rights-of-way, even if they were beneficial. *Id.* at 13. Accordingly, Interior prepared an amendment to the Mission Indian Relief Bill (which became Section 8), authorizing the Bands to contract for the sale of rights-of-way, subject to Interior's approval (*id.* at 13-14), see also 22 Cong. Rec. 311 (1890). It is immediately evident, therefore, that Section 8 was enacted to authorize the alienation of lands by the Indians to third parties under federal supervision; it was not in any way intended to limit the long-standing sovereign authority of Congress to acquire or grant rights-of-way under its plenary power over public lands and Reservations. See *FPC v. Tuscarora Indian Nation*, 362 U.S. at 115-124; *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957); *United States v. Wittek*, 337 U.S. 346, 358-360 (1949); *Grand River Dam Authority v. FPC*, 246 F.2d 453, 455 (10th Cir. 1957).

In short, even if the court below were correct in its view that the interference/inconsistency provision of Section 4(e) must be read in terms of the treaties establishing a Reservation, the license in this case is not thereby flawed inasmuch as Section 8 of MIRA has no impact on the Commission's licensing authority over Indian Reservation land.

(1887). These decisions reflect the principle contained in the Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137, prohibiting private acquisition of Indian lands. This restriction against alienation survives today as 25 U.S.C. 177 except to the extent other statutes constitute an exception to it.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed.

Respectfully submitted.

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I authorize the filing of this brief.

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APPENDIX A

STATUTES INVOLVED

1. The Act of Mar. 3, 1891, ch. 561, § 18, 26 Stat. 1101, codified at 43 U.S.C. 946, as amended, by the Acts of Mar. 4, 1917, ch. 189, §1, 39 Stat. 1197; and May 28, 1926, ch. 409, 44 Stat. 668, provides in pertinent part:

The right of way through the public lands and reservations of the United States is hereby granted to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage, and duly organized under the laws of any State or Territory, and * * * to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof, and, upon presentation of satisfactory showing by the applicant, such additional right of way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals, and laterals; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation; * * *.

2. The Act of May 15, 1896, ch. 37, § 2, 29 Stat. 120, codified at 43 U.S.C. 957, provides in pertinent part:

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and national forests of the United States by any citizen or association of citizens of the United States for the purposes of generating, manufacturing or distributing electric power.

3. The Act of Feb. 15, 1901, ch. 40, § 2, 31 Stat. 790, codified at 43 U.S.C. 959, provides in pertinent part:

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest, and other reservations of the United States, * * * for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines,

electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest
* * *

4. The Act of Mar. 4, 1911, ch. 238, 36 Stat. 1253, codified at 43 U.S.C. 961, provides in pertinent part:

The head of the department having jurisdiction over the lands be, and he is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for transmission and distribution of electrical power, and for poles and lines for communication transmitting, relay, and receiving structures and facilities, to the extent of two hundred feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for radio, television, and other forms of communication transmitting relay, and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by each to exercise the right-of-way

herein granted for any one or more of the purposes herein named: *Provided*, That such right-of-way shall be allowed within or through any Indian or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest

* * *

APPENDIX B

The conditions proposed by Interior and rejected by the Commission as unreasonable can be summarized as follows:

Condition 2

"That the Vista Irrigation District will not utilize its lands above Henshaw Dam in any manner that will adversely affect downstream water quality or quantity. Before the Vista Irrigation District initiates any uses of its lands above Henshaw Dam that may adversely affect downstream water quality or quantity, it must obtain the written consent and approval of the Federal Power Commission, the Commissioner of the Bureau of Indian Affairs, and the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians. This condition shall not apply to the use of the lands above Henshaw Dam for grazing purposes or to the current recreation lease."

(The Commission rejected this condition (Pet. App. 147) on the grounds that the lands would be subject to the Commission's Rules and Regulations to the extent they were covered by the license, the condition was too vague, and to the extent the lands were not covered by the license, the Commission lacked jurisdiction.)

Condition 3

"That the Vista Irrigation District agrees to be subject to the terms and conditions of the license and to the jurisdiction and control of the Federal Power Commission."

(The Commission rejected this condition (Pet. App. 146) on the ground that Vista was already subject to the Commission's jurisdiction.)

Condition 4

"That the Escondido Mutual Water Company and the Vista Irrigation District agree that they shall not infringe upon or interfere in any manner with the right of the Indian reservations to utilize the following annual quantities of water:

	25-year Annual Average	Maximum Annual Diversion
(a) La Jolla	4,990 acre-feet	7,285 acre-feet
(b) Rincon	11,140 acre-feet	16,590 acre-feet
(c) San Pasqual	3,590 acre-feet	5,210 acre-feet
(d) Pauma/Yuima (including Mission Reserve lands)	795 acre-feet	1,190 acre-feet
(e) Pala (including Mission Reserve lands)	21,679 acre-feet	31,880 acre-feet

That the Escondido Mutual Water Company and Vista Irrigation District recognize in their operations on the San Luis Rey River watershed that the reserved and other rights of the Indian reservations to the foregoing quantities of water from the San Luis Rey River shall at all times be prior and paramount to any and all rights of the Escondido Mutual Water Company and the Vista Irrigation District to the water of the San Luis Rey River."

(The Commission rejected this condition (Pet. App. 148-149) on the ground that it would require the Commission to adjudicate the Bands' rights under the *Winters* doctrine—an issue over

which it ruled it lacked jurisdiction and which will be decided in pending United States District Court litigation.)

Condition 5

"That no water be pumped from the Warner groundwater basin shall be transported through Project No. 176 facilities without the prior written agreement of the La Jolla, Rincon, Pala, Pauma, and San Pasqual Bands of Mission Indians, which shall be subject to the approval of the Secretary of the Interior."

(The Commission rejected this condition (Pet. App. 149-150) on the ground that it was inconsistent with the license the Commission was issuing and the Commission's authority to license project works.)

Condition 6

"That the Escondido Mutual Water Company and the Vista Irrigation District acknowledge that the La Jolla, Rincon and San Pasqual Bands of Mission Indians have the right at all times to take from the Escondido Conduit water for agricultural, domestic, recreational or other purposes, or for the purpose of recharging the groundwater basin upon which the Rincon Reservation relies. That the Escondido Mutual Water Company and the Vista Irrigation District will provide water for such purposes at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will release water either at the diversion dam or at the

Rincon penstock for the purpose of recharging the Pauma and/or Pala groundwater basins at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will provide such water from any and all sources as constitute a part of the San Luis Rey River system, including storage in Lake Henshaw, in satisfaction of this condition, and that the Indian Bands shall not be limited to the so-called natural flow of the San Luis Rey River. The releases required by this condition include releases from Lake Henshaw to maintain optimum fish flows in the San Luis Rey River above the diversion dam and releases for the maintenance of water quality in the Pala and Pauma groundwater basins. The quantities supplied to the Indian Reservations shall not exceed the quantities specified in Condition 4 above except when, in the opinion of the Commissioner of Indian Affairs, larger quantities are required for recharge, water quality, or fishery purposes.

(The Commission agreed with the sense of Condition No. 6 but denied it insofar as it was inconsistent with Article 29 of the power license which the Commission issued requiring supply of water to an Indian service area the Commission created (Pet. App. 150-151).)

Condition 7

"That the Escondido Mutual Water Company and the Vista Irrigation District will make the releases required by Condition No. 6 until a court

of competent jurisdiction rules that the releases not be made."

(The Commission rejected condition No. 7 (Pet. App. 150-151) for the same reason it rejected Condition No. 6.)

Condition 8

"That the Escondido Mutual Water Company and the Vista Irrigation District agree to pay to the La Jolla, Rincon, and San Pasqual Bands of Mission Indians such reasonable annual charges as may be fixed by the Federal Power Commission based on the commercial value of the tribal lands involved for most profitable purposes for which suitable, including water and power development."

(The Commission rejected this condition (Pet. App. 151-152) as contrary to Section 10(e) of the FPA, which authorizes the Commission to fix "reasonable annual charges.")

Condition 9

"That the grant of any right-of-way for Project Nos. 176 and 559 across Indian land shall not preclude agricultural or other use by the Bands of any land included within the rights-of-way that are not actually utilized for the facility itself. Provided, however, that the Bands shall not erect permanent structures or make such other uses of the land which would interfere with or obstruct the licensee's access to project facilities; and further provided that the licensee or licensees agree to hold harmless the Bands, any members of the Band or other agents, employees,

lessees, or assigns for any damages, whatsoever, that may be caused by the maintenance or repair of project facilities on Indian lands by the licensee or licensees."

(The Commission rejected this condition (Pet. App. 153) as unnecessary since the rights-of-way run thru mountainous terrain and therefore have no apparent agricultural use.)

Condition 10

"That no new physical or operational use shall be made of the La Jolla, Rincon or San Pasqual Indian Reservations in connection with Project No. 176 operations that has not received the prior written approval of the Band, the Interior Department and the Federal Power Commission."

(The Commission rejected this condition (Pet. App. 153-154) as too vague and because it would preclude the Commission from acting alone when the Commission is entitled to act alone and the condition is not necessary for the protection and utilization of the reservations in view of the protections already afforded by the FPA.)

Condition 11

"That the license shall cover all of the Escondido Canal conduit above ground on the San Pasqual Reservation with precast concrete sections and still remove the unused portion of the concrete and flume structures no longer in use and shall restore the land."

(The Commission rejected this condition (Pet. App. 155-156) on the grounds that Mutual and

Escondido were fencing the canal and that it is not appropriate to destroy a usable facility since the San Pasqual Band could possibly use 12,000 feet of the conduit to be abandoned in order to carry water for their reservation. The Commission further stated that if the San Pasqual Band did not want to use the conduit to convey water, then the reservation should be restored by filling the canal and removing the flume structures.)

No. 82-2056

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In the Supreme Court of the United States

OCTOBER TERM, 1983

ESCONDIDO MUTUAL WATER COMPANY, ET AL., PETITIONERS

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA AND
PALA BANDS OF MISSION INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR

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QUESTIONS PRESENTED

1. Whether, in issuing a license for a hydroelectric project that utilizes federal reservation lands, pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), the Federal Energy Regulatory Commission may modify or reject license conditions deemed "necessary for the adequate protection and utilization" of the reservation by the Secretary with supervisory authority over the reservation.

2. Whether the Commission's obligations under Section 4(e) to make a finding of no interference or inconsistency with the reservation's purpose before issuing a license, and to include in the license the Secretary's conditions for the protection and utilization of the reservation, extend to reservations that are situated directly downstream from a hydroelectric project and whose reserved water rights will be affected by the project.

3. Whether Section 8 of the Mission Indian Relief Act, ch. 65, 26 Stat. 714, requires a Commission licensee whose hydroelectric project is designed to convey water across Mission Indian reservation lands to obtain right-of-way permits from the Bands whose reservations are traversed by the water conveyance facilities.

TABLE OF CONTENTS

	Page
Statutes involved	1
Statement	1
A. Historical background	2
B. The proceedings before the Commission	6
C. The decision of the court of appeals	11
Summary of argument	13
 Argument:	
I. When a proposed power project includes a reservation, Section 4(e) of the Federal Power Act requires the Federal Energy Regulatory Commission to accept without modification conditions prescribed by the Secretary with supervisory authority over that reservation for the adequate protection and utilization of the reservation	16
A. Introduction	16
B. The language of Section 4(e) expresses Congress's intent that licenses for projects on reservations must include, without modification, the conditions prescribed by the appropriate Secretary	21
C. The legislative history of the FPA confirms that the Secretary's Section 4(e) conditions are mandatory	24
D. The Commission's administrative interpretation has not been longstanding or consistent and is not entitled to deference	32
E. Review of the reasonableness of the Secretary's Section 4(e) conditions properly rests with the court of appeals, not the Commission	36

IV

Argument—Continued:	Page
II. Section 4(e)'s reservation proviso protects the reserved water rights of the Pauma, Pala and Yuima reservations	39
III. Petitioners must comply with the right-of-way requirements of Section 8 of MIRA	42
A. Prior to enactment of the FPA, Section 8 of MIRA provided the exclusive method for obtaining rights-of-way across Mission Indian reservations for water conveyance facilities..	43
B. The FPA did not repeal Section 8 of MIRA..	47
Conclusion	51
Appendix	1a

TABLE OF AUTHORITIES

Cases:

<i>Arenas v. United States</i> , 322 U.S. 419	3
<i>Arizona v. California</i> , 373 U.S. 546	40
<i>Arizona Power Authority</i> , 39 F.P.C. 955	35
<i>Cappaert v. United States</i> , 426 U.S. 128	40
<i>Chemehuevi Tribe of Indians v. FPC</i> , 489 F.2d 1207, rev'd, 420 U.S. 395	18
<i>Cherokee Nation v. Southern Kansas Ry.</i> , 135 U.S. 641	43
<i>Consumer Product Safety Commission v. GTE Syl- vania, Inc.</i> , 447 U.S. 102	21
<i>Demby v. Schweiker</i> , 671 F.2d 507	50
<i>First Iowa Hydro-Electric Cooperative v. FPC</i> , 328 U.S. 152	24
<i>FPC v. Tuscarora Indian Nation</i> , 362 U.S. 99.....	24, 39
<i>Gemaco, Inc. v. Walling</i> , 324 U.S. 244	50
<i>General Electric Co. v. Gilbert</i> , 429 U.S. 125.....	32, 36
<i>Greene County Planning Board v. FPC</i> , 528 F.2d 38	21
<i>INS v. Phinpathya</i> , No. 82-91 (Jan. 10, 1984).....	21
<i>Lac Courte Oreilles Band of Lake Superior Chip- pewa Indians v. FPC</i> , 510 F.2d 198	49
<i>Lone Wolf v. Hitchcock</i> , 187 U.S. 553	43

Cases—Continued:

	Page
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130....	42
<i>Missouri, K. & T. Ry. v. Roberts</i> , 152 U.S. 114....	43
<i>Montana Power Co.</i> , 56 F.P.C. 2008	35
<i>Morton v. Mancari</i> , 417 U.S. 535	48
<i>Nadaeu v. Union Pac. R.R.</i> , 253 U.S. 442	43
<i>North Dakota v. United States</i> , No. 81-773 (Mar. 7, 1983)	21
<i>Pacific Gas & Electric Co.</i> , 53 F.P.C. 523	34, 36
<i>Pigeon River Lumber Co.</i> , 1 F.P.C. 206	33, 34, 35
<i>Powers of Indian Tribes</i> , 55 Interior Dec. 14.....	42
<i>Quechan Tribe of Indians v. Rowe</i> , 531 F.2d 408....	42
<i>Radzanower v. Touche Ross & Co.</i> , 426 U.S. 148....	48
<i>Rincon Band of Mission Indians v. Escondido Mutual Water Co.</i> , Nos. 69-217-S, 72-276-S & 72-271-S (S.D. Cal. Jan. 10, 1980)	4, 45
<i>Rio Verde Canal Co.</i> , 27 Interior Dec. 421	47
<i>SEC v. Sloan</i> , 436 U.S. 103	47
<i>Southern California Edison Co.</i> , 8 F.P.C. 364.....	35
<i>Southern Pacific Transportation Co. v. Watt</i> , 700 F.2d 550, cert. denied, No. 83-180 (Nov. 7, 1983)	43
<i>TVA v. Hill</i> , 437 U.S. 153	21
<i>Udall v. FPC</i> , 387 U.S. 428	24, 42
<i>United States v. Appalachian Electric Power Co.</i> , 311 U.S. 377	40
<i>United States v. United States Continental Tuna Corp.</i> , 425 U.S. 164	48
<i>United States v. Portneuf-Marsh Valley Irrigation Co.</i> , 213 F. 601	47
<i>United States v. Sioux Nation of Indians</i> , 448 U.S. 371	43
<i>United States v. Vogel Fertilizer Co.</i> , 455 U.S. 16..	28
<i>Weinberger v. Salfi</i> , 422 U.S. 749	47
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136	42
<i>Zuber v. Allen</i> , 396 U.S. 168	28

Statutes and regulation:

Act of Mar. 3, 1891, ch. 561, § 18, 26 Stat. 1101, as amended, 43 U.S.C. 946	17, 43, 46, 47
---	----------------

VI

Statutes and regulation—Continued:

Page

Act of May 14, 1896, ch. 179, 29 Stat. 120, as amended, 43 U.S.C. 957	17
Act of Mar. 2, 1899, ch. 374, § 1, 30 Stat. 990, as amended, 25 U.S.C. 312	43
Act of Feb. 15, 1901, ch. 372, 31 Stat. 790, as amended, 43 U.S.C. 959	17, 43
Act of Mar. 3, 1901, ch. 832, § 4, 31 Stat. 1084, 25 U.S.C. 811	43
Act of Feb. 1, 1905, ch. 288, § 1, 33 Stat. 628, codified at 16 U.S.C. 472	18
Act of June 21, 1906, ch. 3508, 34 Stat. 386	17
Act of June 23, 1910, ch. 360, 36 Stat. 593	17
Act of Mar. 4, 1911, ch. 238, 36 Stat. 1253, as amended, 43 U.S.C. 961	17
Act of June 23, 1930, ch. 572, 46 Stat. 797	29
Act of Oct. 26, 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2793	17
Federal Power Act, 16 U.S.C. 791a <i>et seq.</i>	1, 1a
§ 3(2), 16 U.S.C. 796(2)	12, 19, 22, 39, 1a
§ 3(11), 16 U.S.C. 796(11)	19
§ 3(12), 16 U.S.C. 796(12)	19
§ 4(e), 16 U.S.C. 797(e)	<i>passim</i>
§ 4(f), 16 U.S.C. 797(f)	34
§ 4(g), 16 U.S.C. 797(g)	7
§ 5, 16 U.S.C. 798	34
§ 9(b), 16 U.S.C. 802(b)	10, 24
§ 10, 16 U.S.C. 803	19
§ 10(a), 16 U.S.C. 803(a)	<i>passim</i>
§ 10(e), 16 U.S.C. 803(e)	6, 40
§ 10(g), 16 U.S.C. 803(g)	19, 2a
§ 10(i), 16 U.S.C. 803(i)	7, 23
§ 11(a), 16 U.S.C. 804(a)	20
§ 14(b), 16 U.S.C. 807(b)	7, 22
§ 15, 16 U.S.C. 808	9, 35
§ 15(a), 16 U.S.C. 808(a)	5, 21
§ 15(b), 16 U.S.C. 808(b)	7
§ 18, 16 U.S.C. 811	20, 3a
§ 21, 16 U.S.C. 814	24
§ 23(b), 16 U.S.C. 817	15, 40, 4a

VII

Statutes and regulation—Continued:

Page

§ 29, 16 U.S.C. 823	10, 11, 49, 5a
§ 29a(c), 16 U.S.C. 823a(c)	20
§ 313(b), 16 U.S.C. 825l(b)	12, 21, 39
§ 405(d), 16 U.S.C. 2705(d)	20
Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 <i>et seq.</i> (codified at 16 U.S.C. 791a <i>et seq.</i>)	5
§ 1, 41 Stat. 1063	29
§ 2, 41 Stat. 1063	29
Indian Reorganization Act, 25 U.S.C. 461 <i>et seq.</i> ...	44
Mission Indian Relief Act of 1891, ch. 65, 26 Stat. 712 <i>et seq.</i>	1, 3, 5a
§ 1, 26 Stat. 712	44
§ 3, 26 Stat. 712	44, 6a
§ 8, 26 Stat. 714	<i>passim</i>
Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1121 <i>et seq.</i> :	
§ 9, 33 U.S.C. 401	17
§ 10, 33 U.S.C. 403	17
25 U.S.C. 323	44
25 U.S.C. 324	44
25 U.S.C. 326	44
43 U.S.C. (1970 ed.) 1396	36
25 C.F.R. 169.3(a)	44

Miscellaneous:

22 Cong. Rec. (1890):	
pp. 306-307	3
pp. 311-313	45
56 Cong. Rec. 9667 (1918)	28
59 Cong. Rec. (1920):	
p. 1564	27, 50
p. 1566	27
72 Cong. Rec. (1930):	
p. 8752	30
p. 10332	30
p. 10336	30
p. 10337	30

VIII

Miscellaneous—Continued:

Page

<i>Federal Power Commission: Hearings on H.R. 11408 Before the House Comm. on Interstate and Foreign Commerce, 71st Cong., 2d Sess. (1930)</i>	29, 31
H.R. 16503, 63d Cong., 2d Sess. (1914)	18
H.R. 16673, 63d Cong., 2d Sess. (1914)	18, 25
H.R. 408, 64th Cong., 1st Sess. (1915)	18
H.R. 8716, 65th Cong., 2d Sess. (1918)	25
H.R. Rep. 2556, 49th Cong., 1st Sess. (1886)	3
H.R. Rep. 3282, 50th Cong., 1st Sess. (1888)	2, 45
H.R. Rep. 3251, 51st Cong., 2d Sess. (1890)	3
H.R. Rep. 910, 66th Cong., 2d Sess. (1920)	50
H.R. Rep. 1299, 66th Cong., 3d Sess. (1921)	28
H.R. Rep. 1793, 71st Cong., 2d Sess. (1930)	29
H.R. Rep. 1643, 90th Cong., 2d Sess. (1968)	36
<i>Investigation of Federal Regulation of Power: Hearings on S. Res. 80 and S. 3619 Before the Senate Comm. on Interstate Commerce, 71st Cong., 2d Sess., Pt. 2 (1930)</i>	31
J. Kerwin, <i>Federal Water-Power Legislation (1926)</i>	18
Lazarus, <i>Indian Rights Under The Federal Power Act</i> , 20 Fed. B.J. 217 (1960)	36
16 Op. Att'y Gen. 552 (1880)	45
18 Op. Att'y Gen. 563 (1887)	45
Pinchot, <i>The Long Struggle for Effective Federal Water Power Legislation</i> , 14 Geo. Wash. L. Rev. 9 (1945)	18
Public Land Law Review Commission, <i>One Third of the Nation's Land: A Report to the President and to the Congress (1970)</i>	36
S. 3331, 64th Cong., 1st Sess. (1915)	18
S. Exec. Doc. 49, 48th Cong., 1st Sess. (1884), reprinted in S. Rep. 74, 50th Cong., 1st Sess. (1888)	2, 3
S. Rep. 378, 71st Cong., 2d Sess. (1930)	29, 30
T. Sedgwick, <i>The Interpretation and Construction of Statutory and Constitutional Law (2d ed. 1874)</i>	48

IX

Miscellaneous—Continued:

Page

<i>Water Power: Hearings Before the House Comm. on Water Power, 65th Cong., 2d Sess. (1918)</i> ..	18, 26, 28
<i>Water Power Bill: Hearing on H.R. 16673 Be- fore the Senate Comm. On Public Lands, 63d Cong., 3d Sess. (1915)</i>	18, 25

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BRIEF FOR THE SECRETARY OF THE INTERIOR

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act, 16 U.S.C. 791a *et seq.*, and the Mission Indian Relief Act, ch. 65, 26 Stat. 712 *et seq.*, are set forth in an appendix to this brief at 1a-10a, *infra*.

STATEMENT

The legal issues in this case arise in the context of a decision by the Federal Energy Regulatory Commission¹ to issue a license permitting the Escondido Mutual Water Company, the City of Escondido and the Vista Irrigation District to operate a small hydroelectric project (Project No. 176) near Escondido, California. As the Commission recognized (Pet. App. 132, 338), however, the principal function of Project No. 176 is not to generate power, but to serve as a water conveyance facility for diverting water

¹ The term "Commission" refers to the Federal Power Commission prior to October 1, 1977, and to the Federal Energy Regulatory Commission thereafter.

from the San Luis Rey River watershed to the Escondido and Vista service areas for municipal and agricultural uses. This case has a long and complicated history, to which we now turn.

A. Historical Background

1. The San Luis Rey River originates near Palomar Mountain in northern San Diego County, California. In its natural condition, it flows through the La Jolla, Rincon and Pala Indian Reservations and then through the City of Oceanside on its way to the Pacific Ocean. Three other Indian reservations—the Pauma, the Yuima (which is under the jurisdiction of the Pauma Band) and approximately three quarters of the San Pasqual—also are within the watershed. (A general map of the area and of Project No. 176 is reproduced at Pet. App. 30 and 308).

The San Luis Rey River watershed is now and historically has been the homeland of the La Jolla, Rincon, Pauma, Pala, and Yuima Indians. The severe plight of these and other Mission Indians of Southern California was brought to the attention of the Nation and Congress in a report prepared in 1883 by two Interior Department officials, Helen Hunt Jackson and Abbot Kinney. S. Exec. Doc. 49, 48th Cong., 1st Sess. 7-37 (1884), *reprinted in* S. Rep. 74, 50th Cong., 1st Sess. (1888). See also H.R. Rep. 3282, 50th Cong., 1st Sess. (1888). The report described the egregious conditions under which the Indians were living and observed that "their history has been one of almost incredible long-suffering and patience under wrongs." S. Exec. Doc. 49, *supra*, at 8-9. Jackson and Kinney recommended that land with safe and secure boundaries be set aside for each band or village of Mission Indians and that all non-Indians living within the reservations be removed. They also recommended that patents be issued for whatever lands were eventually set aside so as to insure the permanence of Indian ownership.

The Jackson-Kinney report led the Department of the Interior to submit a proposed bill to Congress in 1884 for the relief of the Mission Indians. The bill, as amended,

was eventually enacted as the Mission Indian Relief Act of 1891 (MIRA), ch. 65, 26 Stat. 712 *et seq.* The concerns that led to the enactment of MIRA were summarized in the Senate Report (S. Rep. 74, *supra*, at 1, 3 (quoted at Pet App. 4)):

The history of the Mission Indians for a century may be written in four words: conversion, civilization, neglect, outrage. The conversion and civilization were the work of the mission fathers previous to our acquisition of California; the neglect and outrage have been mainly our own. Justice and humanity alike demand the immediate action of Government to preserve for their occupation the fragments of land not already taken from them.

* * * * *

Much of the land is valueless without irrigation, and the Indians are being deprived of their water rights wherever and whenever the interests of the whites demand the appropriation of such rights.

See H.R. Rep. 3251, 51st Cong., 2d Sess. 1, 2-3 (1890).² In short, "[t]he Mission Indians had deserved well and had fared badly and Congress passed the Mission Indian Relief Act of 1891 for their particular redress." *Arenas v. United States*, 322 U.S. 419, 421 (1944) (footnotes omitted).

Pursuant to the provisions of MIRA, the La Jolla, Rincon, San Pasqual and Pala Reservations were with-

² The House Report included the following observations with respect to the plight of the Mission Indians (H.R. Rep. 3251, *supra*, at 3-4 (emphasis added)):

Never before in any other Indian agency have I heard so many cases of complaint concerning land claims, land extortion, land stealing, shifting of lines, unknown boundaries, invasion of reservations, crowding back the Indians upon the mountains, infringement upon water rights, etc. * * *

Encroaching white men should be put off from lands belonging to Indians. The stealing of water from the Indians should be stopped * * *.

See also H.R. Rep. 2556, 49th Cong., 1st Sess. 1-3 (1886); 22 Cong. Rec. 306-307 (1890).

drawn from settlement and entry by order of President Harrison on December 29, 1891. Trust patents were issued in 1892 for the La Jolla and Rincon Reservations, in 1893 for the Pala Reservation, and in 1910 for the San Pasqual Reservation. The Pauma and Yuima Reservations were also established in accordance with MIRA through the acquisition of quitclaim deeds by the United States in 1891 and 1893. Although MIRA originally called for the land to be held in trust for 25 years followed by the issuance of fee patents, the periods of trust were later extended indefinitely. Pet. App. 4.

2. Since 1895, the Escondido Mutual Water Company (Mutual) and its predecessor in interest have diverted the waters of the San Luis Rey River out of the watershed to the community in and around the City of Escondido. The point of diversion is located within the La Jolla Indian Reservation at a point upstream from the other reservations. The conveyance facility, known as the Escondido Canal, traverses parts of the La Jolla, Rincon, and San Pasqual Indian Reservations, as well as some private lands and federal lands administered by the Bureau of Land Management. The canal terminates at Lake Wohlford, an artificial storage facility. Pet. App. 4-5.

Various agreements and permits dating back to 1894 purportedly grant rights-of-way across certain reservation lands, and also provide that specified quantities of water are to be supplied to some of the reservations (Pet. App. 49-58; J.A. 9-38). The meaning and validity of those agreements is the subject of separate proceedings instituted by the Bands (and subsequently joined by the United States) in the United States District Court for the Southern District of California. *Rincon Band of Mission Indians v. Escondido Mutual Water Co.*, Nos. 69-217-S, 72-276-S & 72-271-S.*

* In their complaint, the Bands sought (1) a declaratory judgment that the rights-of-way agreements are void; (2) an injunction prohibiting diversion of the waters of the San Luis Rey River into the Escondido Canal; and (3) substantial damages. On January 10,

In 1915, Mutual constructed the Bear Valley powerhouse, which is located downstream from Lake Wohlford and which generates power with water released from that lake; the Bear Valley powerhouse has a capacity of 520 kilowatts (kw) (Pet. App. 53 & n.24). In 1916, Mutual completed construction of the Rincon powerhouse, which is located on the Rincon Reservation and which generates power with water from the Escondido Canal; the Rincon powerhouse has a capacity of 240 kw (*id.* at 53). Thus, the combined capacity of both plants is less than one megawatt. In 1922, the predecessor of Vista Irrigation District (Vista) constructed Henshaw Dam on the San Luis Rey River, approximately nine miles upstream from Mutual's diversion dam. Pursuant to a complex contractual relationship, Vista and Mutual have shared the output of both Lake Henshaw and a well field located above Lake Henshaw, and the use of the Escondido Canal (*id.* at 56-58).

In 1921, following enactment of the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 *et seq.* (now codified as Part I of the Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*), Mutual applied to the Commission for a license covering its project. In 1924, the Commission issued a 50-year license to Mutual covering the Escondido diversion dam and canal, Lake Wohlford, and the Rincon and Bear Valley powerhouses (but not Vista's Henshaw facilities).⁴

1980, the district court entered an order granting partial summary judgment in favor of the Bands and voiding portions of the disputed contracts. The court of appeals refused to permit an interlocutory appeal of that order, and the case remains pending before the district court (Pet. App. 7). On December 10, 1980, the district court entered a further order granting partial summary judgment in favor of the Bands with respect, *inter alia*, to certain water rights issues. We are lodging copies of the district court's opinions with the Clerk of the Court.

⁴ Mutual's license expired in 1974. Since then, it has operated Project No. 176 under annual licenses issued pursuant to Section 15(a) of the FPA, 16 U.S.C. 806(a).

Since 1925, Mutual and Vista have captured and impounded approximately 90% of the flow of the San Luis Rey River at the diversion dam on the La Jolla Reservation, and have diverted those waters to Lake Wohlford. The total amount of water diverted out of the watershed averages approximately 14,000 acre-feet per year. Natural flow accounts for only 705 acre-feet of the average annual diversion, the remainder consisting of water stored in Lake Henshaw and water pumped from the groundwater basin above Lake Henshaw (Pet. App. 6). Both Escondido and Vista have available alternative supplies of water from sources other than the San Luis Rey River (Pet. App. 125-126, 182).

Approximately ten percent of the diverted flow, an average of 1,500 acre-feet per year, has been delivered to the Rincon Reservation pursuant to a contract entered into by the Secretary of the Interior on behalf of the Rincon Band in 1914. No project water has been delivered to any of the other reservations (Pet. App. 6), although all the reservations include several thousand acres of as yet undeveloped irrigable lands whose natural source of supply is the San Luis Rey River (*id.* at 132-133, 139-141, 177-182, 185-186).

Between 1894 and 1957, none of the Bands received any compensation for the use of its lands or for the diversion of the river. Since 1957, the San Pasqual Band has received \$25 per year in annual charges^{*} for the use of about three acres of tribal lands licensed in that year. Pet. App. 7.

B. The Proceedings Before the Commission

1. In 1969 and 1970, the Secretary of the Interior and the La Jolla, Rincon and San Pasqual Bands filed complaints with the Commission, alleging that Mutual and Vista had violated the provisions of Mutual's 1924 li-

^{*} Annual charges are the sums paid by a licensee for use of reservation lands pursuant to the provisions of Section 10(e) of the FPA, 16 U.S.C. 803(e).

cense. They sought, inter alia, increased annual charges to the Bands through the term of the license. In response, the Commission initiated an investigation pursuant to Section 4(g) of the FPA, 16 U.S.C. 797(g).

In April 1971, Mutual (subsequently joined by the City of Escondido) filed an application with the Commission for a new "minor" hydroelectric license⁶ for Project No. 176. In its application, Mutual proposed to continue operating the project as it had during the original license period.

In 1972, the Secretary requested the Commission to recommend federal takeover of Project No. 176, pursuant to Section 14(b) of the FPA, 16 U.S.C. 807(b) after expiration of the original license.⁷ Additionally, the La Jolla, Rincon, and San Pasqual Bands, acting pursuant to Section 15(b) of the FPA, 16 U.S.C. 808(b), applied for a nonpower license, under the supervision of Interior, to take effect when the original license expired.⁸ The Pauma and Pala Bands subsequently joined in this application. Under both Interior's federal takeover proposal and the Bands' application for a nonpower license, the licensed project facilities would be used for the economic development, primarily agricultural and recreational, of the reservations.

⁶ Section 10(i) of the FPA, 16 U.S.C. 803(i), authorizes the Commission to waive certain conditions and requirements in issuing a minor license for a complete project with a capacity not exceeding 2,000 horsepower (which is the equivalent of 1,500 kw).

⁷ Section 14(b) of the FPA authorizes the Commission to recommend to Congress that the federal government take over a project following expiration of the project's license. If Congress enacts legislation to that effect, the project is operated by the government upon payment to the original licensee of its net investment in the project and certain severance damages. See Pet. App. 312-327.

⁸ Section 15(b) of the FPA authorizes the Commission to grant a license for use of a project as a "nonpower" facility if it finds the project no longer is adapted to power production. In that event, the new licensee must make the same payments to the original licensee that are required of the United States pursuant to Section 14(b).

2. After extensive hearings, an administrative law judge (ALJ) concluded that Project No. 176 is not subject to the Commission's licensing jurisdiction because the power aspects of the project are insignificant in comparison to the project's primary purpose of conveying water for domestic and irrigation consumption (J.A. 357-368). The ALJ emphasized that "[t]he horsepower generated by the entire project is not even the equivalent to that produced by a half dozen modern automobiles" (J.A. 358 (footnote omitted)). The ALJ accordingly recommended dismissal of all Commission proceedings relating to Project No. 176.

3. The Commission reversed the ALJ's decision (Pet. App. 42-378). The Commission first held that it had jurisdiction over the project despite the small amount of electric power generated by the project and the relative insignificance of that power as compared to the project's water conveyance function (*id.* at 74-78).

With regard to the past operation of Project No. 176, the Commission found that Mutual had violated its license by permitting Vista's joint use of project facilities and by diverting water stored in the Lake Henshaw reservoir and pumped from above that reservoir through the Escondido Canal (Pet. App. 226-228). It awarded readjusted annual charges to the La Jolla and Rincon Bands as of September 1969, and to the San Pasqual Band as of May 1970, in amounts based on the operations authorized by the 1924 license (*id.* at 232-234).^{*}

The Commission denied Interior's recommendation for federal takeover of Project No. 176 and the Bands' application for a nonpower license (Pet. App. 92-116). Instead, it granted a new 30-year license to petitioners Mutual, the City, and Vista. Although Vista had not applied for a license with Mutual, the Commission deter-

^{*} The Commission held, however, that any retroactive compensation for use of reservation lands other than as authorized by Mutual's 1924 license must be sought in federal district court (Pet. App. 230).

mined that it should be made a joint licensee because its Henshaw facilities are an integral part of the project (*id.* at 80-86). Having decided to include the Henshaw facilities in the project license, the Commission treated the proceedings as an application for an initial license, rather than as a relicensing pursuant to Section 15 of the FPA, 16 U.S.C. 808 (Pet. App. 133-137 & n.136).

The Commission included certain conditions in the new license designed to satisfy the requirements of Sections 4(e) and 10(a) of the FPA, 16 U.S.C. 797(e) and 803(a), that the license "not interfere or be inconsistent" with the purposes for which the Indian reservations were created and that the project be the one "best adapted to a comprehensive plan" for the development of the San Luis Rey River (Pet. App. 133, 185).¹⁰ Specifically, the Commission required development of a permanent water operating plan (*id.* at 171) and delivery of certain quantities of water to the La Jolla, Rincon, and San Pasqual Reservations for domestic, agricultural, and commercial uses (*id.* at 187).¹¹ The Commission did not impose similar conditions for the benefit of the Pala, Pauma and Yuima Reservations, which are located directly downstream from the project, because it concluded that Section 4(e) applies only to reservations that are physically occupied by the project facilities (Pet. App. 138), and that "insufficient water is available to satisfy all bene-

¹⁰ In including these conditions, the Commission found that the original license for Project No. 176 interfered and was inconsistent with the purposes for which the La Jolla and Rincon Reservations were established (Pet. App. 176-182). The Commission noted (*id.* at 176) that these reservations

were created for the purpose of providing permanent homes for the members of those respective Bands where they can be economically self-sufficient. The concept of economic self-sufficiency requires that the * * * reservations have adequate supplies of water for domestic, agricultural, stockwatering and small commercial consumption by the members of those Bands who choose to earn their livings on reservation lands.

¹¹ The Secretary and the Bands subsequently challenged the adequacy of these conditions, but the court of appeals did not address that issue and it is not before this Court.

ficial public uses within the affected area" (*id.* at 150-151).

Pursuant to Section 4(e) of the Act, the Secretary of the Interior prescribed conditions to be contained in the license which he deemed "necessary for the adequate protection and utilization" of the affected reservations. The Commission accepted some of the Secretary's Section 4(e) conditions, but rejected or modified others on the ground that they would prevent the Commission from exercising its Section 10(a) judgment to ensure that the project would be the one best adapted to a comprehensive plan for beneficial public uses (Pet. App. 143-155).¹²

In addition, the Commission concluded that the licensees were not required, under Section 8 of MIRA (26 Stat. 714), to enter into contracts for canal rights-of-way with those Bands whose reservation lands are traversed by the Escondido Canal (Pet. App. 155-158). The Commission expressed the view that, "in light of the comprehensive regulatory scheme of the Federal Power Act, * * * Section 8 [of MIRA] is not applicable to appliances for the conveyance of water associated with water power projects" (*id.* at 157). On rehearing, the Commission held that, to the extent that Section 8 of MIRA may be inconsistent with provisions of the FPA, the former statute is repealed by Section 29 of the FPA, 16 U.S.C. 823 (Pet. App. 337-338).¹³

Finally, the Commission noted that the outcome of the water rights litigation pending in district court may have a significant impact on the continued validity of the license (Pet. App. 187 n.192).¹⁴ It therefore speci-

¹² The Commission rejected the Secretary's Section 4(e) conditions with respect to the Pala, Pauma and Yuima Reservations because the project works are not located within those reservations (Pet. App. 146-147).

¹³ Section 29 provides that "[a]ll Acts or parts of Acts inconsistent with this chapter are repealed * * *." 16 U.S.C. 823.

¹⁴ Section 9(b) of the FPA, 16 U.S.C. 802(b), requires applicants for water power licenses to submit satisfactory evidence to the

fied that the license may be modified "in any manner considered appropriate" after disposition of the water rights litigation (*id.* at 259).

C. The Decision of the Court of Appeals

1. The court of appeals reversed the Commission's order issuing a license to petitioners and remanded the case to the Commission for further proceedings (Pet. App. 1-29). The court first upheld the Commission's assertion of jurisdiction over the project (*id.* at 12-16). The court concluded, however, that, under Section 8 of MIRA, petitioners are required to obtain from the La Jolla, Rincon and San Pasqual Bands right-of-way permits, which are subject to the approval of the Secretary of the Interior, before they may utilize the portions of the Escondido Canal that traverse those reservations. The court rejected the Commission's argument that Section 29 of the FPA, 16 U.S.C. 823, repealed Section 8 of MIRA. The court saw no conflict between the Power Act and Section 8 of MIRA, which was enacted to enable the Indians to benefit from the construction of irrigation canals across reservation lands (Pet. App. 20-22). In the court's view, the two statutes are easily accommodated: "Where a project requiring a license * * * crosses lands to which MIRA applies, the operator of that project is required both to obtain a license from the Commission, and to obtain the necessary right-of-way by the method provided in Section 8 of MIRA" (Pet. App. 21).

In addition, the court of appeals held that the Commission lacked authority to reject or modify the conditions propounded by the Secretary of the Interior for inclusion in the license pursuant to Section 4(e) of the FPA (Pet. App. 22-25). The court rejected the argument that its interpretation of Section 4(e) conflicts with the Commission's obligation under Section 10(a) of the FPA, 16 U.S.C. 803(a), to approve a project that will be the one "best adapted to a comprehensive plan"

Commission that they possess the necessary water rights to operate the project as authorized in a license.

for the utilization of waterways and the development of power. The court concluded that Sections 4(e) and 10(a) are not inconsistent, reasoning (Pet. App. 24):

In the case of a project within a reservation, once the Secretary of the Interior has propounded those conditions deemed necessary for the protection and utilization of the reservation, the Commission is free to modify the proposal in other ways, but not by altering or omitting Interior's conditions, to make it feasible and beneficial to the public. If this cannot be done, the Commission may decline to issue a license at all.

The court also rejected the claim that its construction of Section 4(e) would give the Secretary of the Interior an "unconditional veto power" over licensing authority, noting that any license issued by the Commission that includes conditions propounded by the Secretary would be subject to judicial review pursuant to Section 313(b) of the FPA, 16 U.S.C. 825l(b) (Pet. App. 24-25, as amended at Pet. App. 32-33).

Finally, the court held that the three reservations located downstream from the project also are entitled to the protection of the Section 4(e) reservation proviso. The court noted that the definition of "reservations" in the FPA includes "interests in lands" owned by the United States and reserved from private appropriation under public land laws (16 U.S.C. 796(2)), and it concluded that the water rights of the Pala, Pauma and Yuima Bands come within this definition (Pet. App. 25-26). Although it acknowledged that the use of the phrase "licenses . . . within any reservation" suggests that a project must be physically situated on a reservation before the provisions of Section 4(e) come into play, the court stated that it would resolve that ambiguity in favor of the applicability of the 4(e) proviso to the downstream reservations. The court reasoned (Pet. App. 27-28):

A water project may occupy a geographical portion of an Indian reservation without impinging in

any serious way on Indian interests—e.g., by crossing a corner of the reservation with a power line or an access lane. Conversely, a project may turn a potentially useful reservation into a barren waste without ever crossing it in the geographical sense—e.g., by diverting the waters which would otherwise flow through or percolate under it. We will not attribute to Congress, on account of the mere presence in its enactment of one ambiguous word, the perverse and illogical intention of guarding carefully against the former danger while openly embracing the latter.

2. On petitions for rehearing, Judge Anderson dissented from portions of the panel's original opinion (Pet. App. 33-41). Noting that the FPA itself contains a scheme for acquiring the use of tribal lands within reservations, Judge Anderson concluded that Section 8 of MIRA cannot be considered as establishing a prerequisite for obtaining rights-of-way for FPA-licensed projects that convey water across Mission Indian reservation lands (Pet. App. 34-37). Furthermore, Judge Anderson concluded that, although the Secretary of the Interior's Section 4(e) conditions must be included in a license to the extent they are reasonable, the initial responsibility for reviewing those conditions for reasonableness should rest with the Commission, rather than with the reviewing court (Pet. App. 40-41).

SUMMARY OF ARGUMENT

I

Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), authorizes the Federal Energy Regulatory Commission to issue licenses for hydroelectric projects on any body of water over which Congress has jurisdiction under its commerce power, "or upon any part of the public lands or reservations of the United States." The statute specifically requires, however, that, before issuing a license for a project on a reservation, the Commission must find that the license "will not interfere or be

inconsistent" with the reservation's purpose. And, most relevantly, Section 4(e) also provides that any such license *"shall be subject to and contain such conditions"* as the Secretary with supervisory authority over the reservation *"shall deem necessary for the adequate protection and utilization of the reservations."*

Both the language and history of the FPA make Congress's intent crystal clear: when an applicant seeks a license for a project on a reservation (*e.g.*, a military reservation, a national forest, or an Indian reservation), the conditions prescribed by the appropriate Secretary for the protection and utilization of the reservation *must* be included in the license. The Commission, to put it simply, has no authority either to reject or to modify the Secretary's conditions. Thus, although Congress has permitted reservations to be used for water power development, it has sought to ensure that such reservations are adequately protected from the adverse effects of such development and that the uses for which the reservations were created are not impaired.

Petitioners and the Commission argue that this approach would undermine the principal goal of the FPA, which was to centralize licensing decisions in a single Commission. But Congress deliberately constructed the licensing provisions of the FPA in such a way as to preserve the responsibility of the individual Secretaries for the welfare of those reservations within their respective jurisdictions. This seems to us a perfectly rational scheme of allocating authority in the case of a project on a reservation. In any event, Congress has spoken clearly on the matter and the wisdom of the statutory scheme is not before the Court. Despite the dire protestations of petitioners and the Commission, the statute does not permit the Secretary to insert unreasonable conditions in the license and thus thwart the project. The Secretary's conditions are subject to review for reasonableness in the court of appeals, together with all other elements of the license.

II

The Commission's obligations under Section 4(e) to make a finding of no interference or inconsistency with the reservation's purpose before issuing a license, and to include in the license the appropriate Secretary's conditions for the protection and utilization of the reservation, extend to the Pauma, Pala and Yuima Reservations, which are located directly downstream from petitioners' proposed project, and whose reserved water rights will be affected by the project. The FPA defines "reservations" as including "interests in lands" that are owned by the United States or that are "acquired and held for any public purposes." As the court of appeals held (Pet. App. 25-26), the reserved water rights of the downstream reservations clearly are encompassed within this definition. Although the language of Section 4(e), which refers to "licenses issued * * * within any reservation," tends "to paint a geographical picture" (Pet. App. 26), it is more sensible to conclude that the Section 4(e) provision applies to any reservations that are sufficiently "affected" by a project to warrant invocation of the Commission's licensing authority under Section 23(b) of the FPA, 16 U.S.C. 817.

The argument that the downstream reservations are not protected by the Section 4(e) proviso because the Commission is not empowered "to adjudicate" water rights misses the point entirely. Adjudication of water rights is a far different matter from formulating conditions for the protection and utilization of a reservation. Indeed, the Commission itself recognized as much when, in including its own conditions in the license, pursuant to Section 10(a) of the FPA, 16 U.S.C. 803(a), it stated that its conditions were the "price in water of the power license" (Pet. App. 176). That the Commission is empowered to include conditions under the public interest standard of Section 10(a), however, does not render the Section 4(e) reservation proviso superfluous. Section 10(a) permits a balancing of various conflicting inter-

ests, whereas Section 4(e) requires a focused inquiry specifically designed to protect reservations.

III

Section 8 of MIRA authorizes rights-of-way across Mission Indian reservations for water conveyance facilities. Unlike other contemporaneously enacted right-of-way statutes, however, Section 8 of MIRA expressly requires tribal consent for such a grant. Against a background of widespread abuses of Mission Indians by white settlers, and, in particular, infringement on Indian water rights, Section 8 was enacted for the articulated purpose of securing for the Bands a "sufficient quantity of water for irrigating and domestic purposes" (26 Stat. 714).

Section 8 of MIRA, which is a specific statute addressing rights-of-way for water conveyance facilities, is applicable to petitioners' project, whose primary purpose is to convey water (and which only incidentally produces a small amount of power). The FPA, a general statute concerned with water power development, is not inconsistent with, and does not repeal, Section 8 of MIRA, either expressly or by implication. Nothing in the FPA or its history precludes a requirement of tribal consent where, as here, Congress previously legislated such a requirement.

ARGUMENT

I. WHEN A PROPOSED POWER PROJECT INCLUDES A RESERVATION, SECTION 4(e) OF THE FEDERAL POWER ACT REQUIRES THE FEDERAL ENERGY REGULATORY COMMISSION TO ACCEPT WITHOUT MODIFICATION CONDITIONS PRESCRIBED BY THE SECRETARY WITH SUPERVISORY AUTHORITY OVER THAT RESERVATION FOR THE ADEQUATE PROTECTION AND UTILIZATION OF THE RESERVATION

A. Introduction

1. In 1920, after more than six years of intense debate, Congress enacted the Federal Water Power Act

(FWPA), ch. 285, 41 Stat. 1063 *et seq.* (now codified as Part I of the FPA, 16 U.S.C. 791a *et seq.*). This was the culmination of congressional efforts to develop a comprehensive national policy for the hydroelectric development of our Nation's waterways. Prior to passage of the FWPA, control of hydroelectric development on federal lands and federally controlled waters was divided among three agencies: the Department of War, which had jurisdiction over navigable waterways and military reservations;¹⁵ the Department of the Interior, which had jurisdiction over public lands, national parks and monuments, and Indian reservations;¹⁶ and the De-

¹⁵ The Secretary of War's authority stemmed principally from the Rivers and Harbors Appropriation Act of 1899, Ch. 425, 30 Stat. 1151, which required the consent of Congress, the Secretary of War (now Army), and the Chief of Engineers prior to the construction of any dam, bridge, or similar facility in the navigable waters of the United States, and which prohibited the obstruction of the navigable capacity of any waters of the United States even if such obstruction occurred on nonnavigable tributaries. See Sections 9 and 10, codified at 33 U.S.C. 401 and 403. In 1906 and 1910, Congress enacted the General Dam Acts, which specified conditions under which Congress would grant its permission for the construction of dams in navigable waters. Act of June 21, 1906, ch. 3508, 34 Stat. 386; Act of June 23, 1910, ch. 360, 36 Stat. 593. Both of these Acts required the Secretary of War and the Chief of Engineers to approve plans and specifications for all dams and accessory works.

¹⁶ The Act of Mar. 3, 1891, ch. 561, § 18, 26 Stat. 1101, as amended, 43 U.S.C. 946, authorized the Secretary of the Interior to grant rights-of-way through the public domain for ditches, canals and reservoirs for purposes of irrigation. Development of electricity under this act was a subsidiary purpose. In 1896, Congress expressly authorized the Secretary to grant rights-of-way upon public lands and forest reserves "for the purpose of generating, manufacturing, or distributing electric power." (Act of May 14, 1896, ch. 179, 29 Stat. 120, as amended, 43 U.S.C. 957). See also Act of Feb. 15, 1901, ch. 372, 31 Stat. 790, as amended, 43 U.S.C. 959; Act of Mar. 4, 1911, ch. 238, 36 Stat. 1253, as amended, 43 U.S.C. 961. These Acts were repealed in 1976 insofar as they were applicable to the issuance of rights-of-way through public lands and lands within the National Forest System. Act of Oct. 26, 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2798.

partment of Agriculture, which had jurisdiction over national forests.¹⁷ See generally, *Chemehuevi Tribe of Indians v. FPC*, 489 F.2d 1207, 1215-1223 (D.C. Cir. 1973), rev'd on other grounds, 420 U.S. 395 (1975); J. Kerwin, *Federal Water-Power Legislation* 105-114 (1926); Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945).

Between 1914 and 1917, Congress considered various bills that dealt separately with hydroelectric development on navigable waters and public lands.¹⁸ In 1917, President Wilson directed the Secretaries of War, Interior, and Agriculture to draft a bill establishing a comprehensive scheme for regulating water power development on all federal lands and waters. Kerwin, *supra*, at 217-218. Extensive hearings were held on this bill in 1918,¹⁹ but it was not enacted into law until the following session of Congress. *Id.* at 255-262. As initially enacted, the statute provided for a Commission composed of the three Secretaries. As explained below (see pages 29-31, *infra*), the Act was amended in 1930 to create a Commission composed of five independent members.

¹⁷ In 1905, Congress transferred responsibility for the national forests from Interior to the Forest Service of the Department of Agriculture. Act of Feb. 1, 1905, ch. 288, § 1, 33 Stat. 628, codified at 16 U.S.C. 472. Thereafter, the Secretary of Agriculture issued permits for rights-of-way across national forests pursuant to the statutes listed in note 16, *supra*.

¹⁸ See, e.g., H.R. 16053, 63d Cong., 2d Sess. (1914) (Adamson Bill) (navigable waters); H.R. 16673, 63d Cong., 2d Sess. (1914) (Ferris Bill) (public lands); H.R. 408, 64th Cong., 1st Sess. (1915) (Ferris Bill) (public lands); S. 3331, 64th Cong., 1st Sess. (1915) (Shields Bill) (navigable waters). See also *Water Power Bill: Hearing on H.R. 16673 Before the Senate Comm. On Public Lands*, 63d Cong., 3d Sess. (1915) [hereinafter cited as *1914-1915 Hearings*]. *Chemehuevi Tribe of Indians v. FPC*, 489 F.2d at 1220 n. 61; Kerwin, *supra*, at 172-216.

¹⁹ *Water Power: Hearings Before the House Comm. on Water Power*, 65th Cong., 2d Sess. (1918) [hereinafter cited as *1918 Hearings*].

2. The basic licensing authority of the Federal Power Act is contained in Section 4(e), 16 U.S.C. 797(e). That section authorizes the Commission to issue licenses "for the purpose of constructing, operating, and maintaining" dams, water conduits, reservoirs, or other project works²⁰ "necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power" across or in any bodies of water over which Congress has jurisdiction under the Commerce Clause, "or upon any part of the public lands and reservations of the United States (including the Territories)." Section 10 sets forth certain general conditions upon which licenses are issued. Among other things, it requires that "the project adopted * * * shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan" for developing waterways for commerce, water power development, and other beneficial uses. 16 U.S.C. 803(a). Accordingly, the Commission may require the modification of any project and the plans and specifications of the project works before approval. It may also impose such "other conditions [as are] not inconsistent with the provisions of this chapter." 16 U.S.C. 803(g).

Congress, however, has not left every aspect of the licensing decision to the Commission's discretion. On the contrary, it has expressly limited the Commission's discretion where reservations²¹ and navigable waterways are involved. Thus, the second proviso of Section 4(e) states that no "license affecting the navigable ca-

²⁰ "Project works" are defined as all physical structures of a project, including power houses, water conduits, dams and appurtenant works and structures. 16 U.S.C. 796(11) and (12).

²¹ The FPA defines "reservations" to include "national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes." 16 U.S.C. 796(2).

capacity of any navigable waters of the United States shall be issued" until the plans of any structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army.²² Section 18 of the FPA states that the Commission "shall require" a licensee to construct, maintain, and operate such "fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate." 16 U.S.C. 811. That section further provides that the operation of any navigation facilities constructed in connection with a dam or diversion structure "shall at all times be controlled by" such navigation regulations "as may be made from time to time by the Secretary of the Army." Finally, the Commission must require the licensee to construct and maintain at its own expense such lights and signals "as may be directed by" the Coast Guard.²³

Like restrictions on the Commission's discretion are applicable in the case of licenses affecting federal reservations. Under the first proviso to Section 4(e), no such license may issue unless the Commission finds that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." And, most importantly for present purposes, Section 4(e) also provides that the license issued "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations."

²² Similarly, Section 11(a) of the FPA, 16 U.S.C. 804(a), provides that the Commission may require a licensee to construct improvements for navigation purposes "in accordance with plans and specifications approved by the Chief of Engineers and the Secretary of the Army."

²³ More recently, Congress has required the Commission, in granting exemptions to the FPA's licensing requirements, to include in its exemptions conditions prescribed by the Fish and Wildlife Service and by the comparable state agency to prevent loss of, and damage to, fish and wildlife resources. 16 U.S.C. 823a(c). See also 16 U.S.C. 2705(d).

B. The Language of Section 4(e) Expresses Congress's Intent that Licenses for Projects on Reservations Must Include, Without Modification, the Conditions Prescribed by the Appropriate Secretary

Petitioners (Br. 33-34) and the Commission (Br. 17-21) go to great lengths to direct the Court's attention away from the specific language of the Section 4(e) proviso at issue here.²⁴ As this Court has frequently observed, however, the starting point in construing a statute must be the statutory language, because it is logical to assume that Congress expresses its purposes through the ordinary meaning of the words it uses. See, e.g., *INS v. Phinpathya*, No. 82-91 (Jan. 10, 1984), slip op. 4. Thus, "[a]bsent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive." *North Dakota v. United States*, No. 81-773 (Mar. 7, 1983), slip op. 12 (quoting *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Furthermore, the

individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.

TVA v. Hill, 437 U.S. 153, 194 (1978).

²⁴ Petitioners go so far as to contend (Br. 42-44) that Section 4(e)'s reservation proviso does not even apply here because this is a relicensing proceeding pursuant to Section 15(a) of the FPA, 16 U.S.C. 808(a). This argument must be rejected out of hand, since petitioners failed to preserve this objection. The Commission applied Section 4(e) after finding that the project for which petitioners sought a license was materially different from that originally licensed (Pet. App. 133-137). Because petitioners did not object to this finding in their petitions for rehearing to the Commission (COR 25,834-25,926), consideration of that issue is foreclosed. 16 U.S.C. 825(b) (COR refers to the certificate of record in the court of appeals.) See *Greene County Planning Board v. FPC*, 528 F.2d 38, 45-46 (2d Cir. 1975).

The language of the first proviso in Section 4(e) could not be clearer. That statute expressly states that when a license includes a reservation, the license "*shall be subject to and contain such conditions* as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." 16 U.S.C. 797(e) (emphasis added).

Several points are obvious from a plain reading of the text. To begin with, the statute requires that the license "shall be subject to and contain" the Secretary's conditions. This language leaves no room for the Commission to reject or modify those conditions.²⁵ Moreover, the statute charges the Secretary under whose supervision the reservation falls with the responsibility for developing those conditions.²⁶ This is in contrast to the first clause of the reservation proviso, which charges the Commission with making a finding that the license will not interfere or be inconsistent with the purposes for which the reservation was created.

²⁵ Congress easily could have expressed a contrary intention by providing that the Secretary may "recommend" conditions for inclusion in the license. See Section 14(b) of the FPA, 16 U.S.C. 807(b), which provides that any agency may recommend that the United States exercise its right to take over any project.

²⁶ The Secretary of the Interior does not claim authority to impose Section 4(e) conditions on every Commission project. His Section 4(e) authority is activated only in the case of reservations under his supervision. In the instant proceeding, the reservations involved are all Indian reservations under the supervision of Interior. But the term "reservations" also includes, *inter alia*, national forests under the supervision of the Department of Agriculture and military reservations under the supervision of the Department of Defense. 16 U.S.C. 796(2). Thus, when national forests or military reservations are included within licenses, the Secretaries of those departments have authority to develop conditions for the protection and utilization of those reservations. As discussed below (page 38, *supra*), the Secretaries' Section 4(e) authority is limited to developing conditions that are reasonably necessary for the adequate protection and utilization of the reservations.

In sum, although the authority to issue a license rests with the Commission, Congress empowered other federal officials to protect other federal interests, such as navigation, fishways, and reservations. See pages 19-20, *supra*. The Commission argues (Br. 19-20 & n.25), however, that if it is required, under Section 4(e), to accept the Secretary's conditions without modification, its authority to adopt the project best adapted to a comprehensive plan for beneficial uses, pursuant to Section 10 (a) of the FPA, 16 U.S.C. 803(a), would thereby be impaired.²⁷ But this argument, if accepted, would require the Court to construe the specific mandate of Section 4(e) in such a way as to deprive it of meaning.

Congress has determined that power projects may be located on reservations, but only if issuance of the license would not interfere with the reservation's purposes and only if the appropriate Secretary's conditions are inserted in the license to insure adequate protection and utilization of the reservation. There can be no doubt that the reservation proviso in Section 4(e) makes protection and utilization of reservations paramount to power development.²⁸ Significantly, Congress placed the responsibility for prescribing the Section 4(e) conditions squarely upon the Secretary with responsibility over the affected reservation. Thus, while the Commission is guided by its authority under Section 10(a) to promote power development, it is the individual Secretary's responsibility under Section 4(e) to see that reservations under his supervision are adequately protected from the

²⁷ Petitioners also cite (Br. 34 n. 45) Section 10(i) of the FPA, 16 U.S.C. 803(i), which permits the Commission to waive certain conditions and requirements in issuing licenses for minor projects. Although Project No. 176 qualifies as a minor project in view of the minimal amount of power it produces, the Commission expressly refused to waive the Section 4(e) requirements in this case (Pet. App. 137).

²⁸ This proviso parallels the second proviso of Section 4(e), which likewise makes protection of the navigable waterways paramount to power development. See, pages 19-20, *supra*.

adverse effects of that power development and that the uses for which the reservations were created are not impaired. Although the Commission makes a "public interest" determination under Section 10(a) (*Udall v. FPC*, 387 U.S. 428, 450 (1967)), that decision must be made in light of the secretarial conditions. If the conditions necessary to protect the reservation from the adverse effects of the power development make the project infeasible, the Commission "may decline to issue a license" (Pet. App. 24).

It is no answer to invoke—as both petitioners (Br. 33) and the Commission (Br. 13, 21) do—generalized statements in earlier cases to the effect that the FPA constitutes a "complete and comprehensive plan" for the development of hydroelectric power (*FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960)), and was intended to replace the "piecemeal" approach to hydroelectric development that existed under earlier laws (*First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 180 (1946)). These statements obviously do not address or resolve the question presented here concerning the extent to which the FPA itself allocates responsibilities to federal agencies other than the Commission.²⁹

C. The Legislative History of the FPA Confirms that the Secretary's Section 4(e) Conditions are Mandatory

One overriding congressional concern is clear from the FPA and its legislative history: military reservations,

²⁹ The Court's statement in *Tuscarora* was made in the context of determining whether reservation lands owned in fee by an Indian tribe, which the Court concluded did not constitute a "reservation" as that term is defined in the FPA, were subject to condemnation under Section 21 of the FPA, 16 U.S.C. 814. In *First Iowa*, the Court concluded that Section 9(b) of the FPA, which requires a license applicant to submit satisfactory evidence that it has complied with state laws respecting water appropriation, use of streambed, and the right to engage in the power business, does not require the applicant to comply with other state laws that conflict with the authority delegated to the Commission in the FPA.

Indian reservations, and national forests, which have been reserved from public disposal for specified uses, are not to be impaired by hydroelectric development. Even the earliest bills under consideration, which would have authorized the Secretary of the Interior to lease "reserved or unreserved" public lands, typically provided that

such leases shall be given within or through any of said national forests or other reservations only upon a finding by the chief officer of the department under whose supervision such forest, national monument, or reservation falls that the lease will not injure, destroy, or be inconsistent with the purpose for which such forest, national monument, or reservation was created or acquired.

H.R. 16673, 63d Cong., 2d Sess. § 1 (1914), *reprinted in 1914-1915 Hearings* 5-6. As Edward Finney, the Assistant Attorney of the Department of the Interior, testified, the intent of this clause was to permit the chief officer with supervisory authority over the reservation "to refuse to sanction [the license] upon the grounds that it might interfere with the purposes of the reservation." *1914-1915 Hearings* 79.

This concept was retained in subsequent proposals, including the bill prepared in 1917 by the Secretaries of War, Interior and Agriculture at the request of President Wilson (see page 18, *supra*). The relevant provision of the Administration bill (H.R. 8716, 65th Cong., 2d Sess. § 4(d) (1918)) was ultimately enacted without substantive change as part of the FPA. In a memorandum explaining the bill, O.C. Merrill, one of the chief draftsmen of the FWPA in the Department of Agriculture and later the first Commission Secretary, wrote that creation of the Commission "will not interfere with the special responsibilities which the several Departments have over the National Forests, public lands and navigable rivers" (J.A. 371). With regard to what is now Section 4(e), he explained (J.A. 373-374 (emphasis added)):

4. Licenses for power sites within the National Forests to be subject to such provisions for the protection of the Forests as the Secretary of Agriculture may deem necessary. Similarly, for parks and other reservations under the control of the Departments of the Interior and of War. Plans of structures to be subject to the approval of the Secretary of War.

This provision is for the purpose of preserving the administrative responsibility of each of three Departments over lands and other matters within their exclusive jurisdiction.

This position was reaffirmed during hearings on the Administration's water power bill, when Secretary of Agriculture Houston was asked about the possibility of exempting the Grand Canyon from the operation of the bill. He responded (1918 Hearings 683 (emphasis added)) :

I can see no special reason why the matter might not be handled safely under the provisions of the proposed measure, which requires that developments on Government reservations may not proceed except with the approval of the three heads of departments—the commission—with such safeguards as the head of the department immediately charged with the reservation may deem wise.

Later, Secretary Houston left no doubt that a Secretary's Section 4(e) conditions could not be overridden by the Commission as a whole:

If I am not mistaken, the provisions in the proposed measure are more restrictive than existing law, in that they require the assent of three heads of departments and also the assent of the particular head of the department immediately charged with that Government interest.

1918 Hearings 684 (emphasis added).

The intended import of Section 4(e) was again demonstrated during the Senate debates on the Administration's bill. In explaining the effect of Section 4(e), Senator

Walsh of Montana, a strong supporter of the Administration's bill, stressed that a license for a project on an Indian reservation could not issue without the consent of the Secretary of Interior:

That is to say, when an application is made for a license to construct a dam within an Indian reservation, the matter goes before the commission, which consists of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture. They all agree that it is in the public interest that the license should be granted, or a majority of them so agree. *Furthermore, the head of the department must agree; that is to say, the Secretary of the Interior in the case of an Indian reservation must agree that the license shall be issued.*

59 Cong. Rec. 1564 (1920) (emphasis added).³⁰

In contrast, the Commission and petitioners are unable to point to any legislative history leading to the passage of the 1920 FWPA that contradicts the statute's plain meaning that a Secretary's Section 4(e) conditions are binding on the Commission.³¹ The references in the hearings and committee reports cited by the Commission (Br. 23) address the need to develop and implement a national water power policy through a single commission, rather

³⁰ Although petitioners recognize that the thrust of Senator Walsh's remarks were that "Interior could 'veto' the use of reservation land" (Pet. Br. 35 n.46), they attempt to place Senator Walsh's statement "in perspective" by pointing to comments subsequently made by Senator Myers. But those comments refer only to the circumstances under which Senator Myers thought the Secretary would vote to issue a license using reservation lands. Unlike Senator Walsh, Senator Myers did not address the question whether Section 4(e) required Interior's consent to a project involving an Indian reservation, although the logical implication of Senator Myers' statement that the Secretary would "resist" any application that was not "fair and right and reasonable" to the Indians (59 Cong. Rec. 1566 (1920)) is that he too believed Interior's consent was required.

³¹ Indeed, amici American Public Power Association, *et al.*, concede (Br. 11 n.19) that this legislative history provides support for our interpretation.

than through three separate departments with jurisdiction over a particular project dependent upon whether it was to include navigable waters, public lands, or national forests. We do not dispute that this is what Congress intended in creating the Commission. But Congress also expressly afforded special protections to reservations in Section 4(e). The general references cited by the Commission do not address the effect of that proviso.³² On the other hand, the statements from the legislative history on which we rely were directed specifically at the effect of Section 4(e), and thus are far more persuasive than the remarks quoted by the Commission and petitioners. Moreover, the statements of agency representatives such as O.C. Merrill and Secretary Houston, who "participated in drafting and directly made known their views to Congress in committee hearings," are necessarily entitled to "great weight." *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982) (quoting *Zuber v. Allen*, 396 U.S. 168, 192 (1969)).³³

³² Likewise, the statements in the debates cited by the Commission (Br. 23-25 & n.29) were made during discussion of Section 2 of the proposed bill, not Section 4(e). The discussion concerned how the Commission was to undertake its work, i.e., whether the Commission could draw upon the staffs of all three departments, or whether each Secretary individually would "run with an iron hand" the lands under his own jurisdiction. 56 Cong. Rec. 9667 (1918) (Rep. Ferris).

By the same token, the portions of Secretary Houston's testimony on which petitioners rely (Br. 34-35) focused not on the Section 4(e) proviso, but on other matters, such as the desirability of reposing authority in a commission composed of three Secretaries rather than in a single executive (1918 *Hearings* 676-677), and the scope and implementation of Section 10(a) of the Act (1918 *Hearings* 678).

³³ The 1921 House report cited by the Commission (Br. 25) does not address the Secretary of the Interior's authority under Section 4(e). The Secretary objected to the inclusion of national parks and monuments within the FWPA because he believed that Congress should determine on a case-by-case basis whether any hydroelectric development should occur in national parks or monuments. H.R. Rep. 1299, 66th Cong., 3d Sess. 2 (1921).

The reliance by the Commission and petitioners upon the legislative history of the 1930 amendments to the FWPA is equally unpersuasive. Significantly, the 1930 legislation amended only Sections 1 and 2 of the FWPA. Act of June 23, 1930, ch. 572, 46 Stat. 797. The amendments reorganized the Commission by replacing the three Secretaries with five independent Commissioners appointed by the President. Congress also for the first time authorized the Commission to hire its own headquarters staff instead of requiring it to rely upon personnel detailed from the Departments of War, Interior, and Agriculture,³⁴ although the amendments did continue in force the pre-existing arrangement under which engineers from those three Departments were detailed for work in the Commission's field offices. The 1930 amendments, however, left unchanged the Section 4(e) proviso empowering individual Secretaries to impose conditions on licenses to insure the adequate protection and utilization of reservations under their supervision.

The purpose of the 1930 amendments was spelled out in the President's message to Congress accompanying the proposed legislation. Because the work of the Commission had greatly expanded since 1920, the Secretaries were unable to devote sufficient time to fulfill their responsibilities under the FWPA. Thus, the President recommended, and Congress provided for, full-time Commissioners to replace them. See *Federal Power Commission: Hearings on H.R. 11408 Before the House Comm. on Interstate and Foreign Commerce*, 71st Cong., 2d Sess. 18 (1930) [hereinafter cited as *1930 House Hearings*]; S. Rep. 378, 71st Cong., 2d Sess. 2-3 (1930); H.R. Rep. 1793, 71st Cong., 2d Sess. 2-3 (1930).

³⁴ The 1920 FWPA had authorized the Commission to hire only an executive secretary. Act of June 10, 1920, ch. 285, § 2, 41 Stat. 1063. The 1930 amendments gave the Commission additional authority to hire a chief engineer, a general counsel, a solicitor, a chief accountant, and such other "officers and employees as are necessary" to carry out its functions. § 2, 46 Stat. 798.

The legislative history makes clear that the 1930 amendments were not intended to alter in any way the respective powers of the Commission and the Secretaries. Thus, the Senate Report stated that the purpose of the legislation was "to reorganize the Federal Power Commission *without adding to the existing authority of the commission.*" S. Rep. 378, *supra*, at 2. Similarly, the remarks during the floor debates confirm that the 1930 amendments did not enlarge the powers of the Commission. See, *e.g.*, 72 Cong. Rec. 8752 (1930) (colloquy between Sen. Robinson and Sen. Couzens); *id.* at 10332 (Rep. Clark). For example, in response to a question concerning whether the bill would interfere with the requirement, in the second proviso of Section 4(e), that plans for a dam affecting navigation must be approved by the Chief of Engineers and the Secretary of War, Representative Parker, Chairman of the House Committee and chief proponent of the bill, stated (72 Cong. Rec. 10332 (1930)): "There is no intention to take away from the War Department and from the Army engineers the power to decide whether a dam will be detrimental to navigation or not." Similarly, Representative O'Connor inserted into the record a memorandum from the Chief of Engineers of the War Department, who opposed the bill's enactment. The memorandum stated that, by repealing Section 2 of the FWPA, the bill

takes from the Secretary of War and the Chief of Engineers all authority and responsibility in connection with the investigation of water-power developments in navigable waters or on tributaries thereto, and *confines their functions to the veto power contained in section 4(d)* [now Section 4(e)] of the act.

72 Cong. Rec. 10336, 10337 (1930) (emphasis added). In short, there is no indication that Congress in 1930 meant to reduce the authority of the Secretaries under Section 4(e) to prescribe conditions for inclusion in licenses with respect to projects on reservations within their respective jurisdictions.

The Commission (Br. 25-27, 42 n.43) and petitioners (Br. 35-37) rely upon isolated statements from the 1930 hearings that do not mention the Secretaries' Section 4(e) authority. The focus of the discussion during the hearings was on how the staff work of the new commission would be carried out. Although the Chief Engineers of both the Forest Service and the War Department argued that the engineering work of the Commission should continue to be performed in the field by employees of the individual departments (1930 *House Hearings* 14-15, 22-24), Agriculture Secretary Hyde and Interior Secretary Wilbur believed that the Commission should have its own staff, not one under the control of the departments, and that the interests of the departments could be presented at hearings before the Commission (*id.* at 32-33 (Secretary Hyde), 48-49 (Secretary Wilbur)). Neither Secretary Wilbur nor Secretary Hyde specifically addressed the authority of the individual Secretaries under Section 4(e) to condition licenses for projects on reservations. In contrast, Representative Hoch, a member of the House Committee, stated that the bill "does not affect in any way the present law with reference to the granting of permits or licenses, [or] *the conditions under which they are granted*" (1930 *House Hearings* 28 (emphasis added)). See also *id.* at 46 (Rep. Parks). Thus, even if portions of Secretary Wilbur's and Secretary Hyde's remarks might be construed as suggesting that the Secretaries' Section 4(e) conditioning authority should be curtailed, there is no evidence that Congress in fact accepted that suggestion. See pages 29-30, *supra*.³⁵

³⁵ The Commission also relies (Br. 25-26) upon statements made by O.C. Merrill and James Lawson, then Acting Chief Counsel of the Commission. *Investigation of Federal Regulation of Power: Hearings on S. Res. 80 and S. 3619 Before the Senate Comm. on Interstate Commerce*, 71st Cong., 2d Sess., Pt. 2 (1930) [hereinafter cited as 1930 *Senate Hearings*]. Merrill, who by that time had left the Commission (1930 *Senate Hearings* 211), advocated that the Commission's field work should be done by the three departments, but that the departments would have "no final responsibility" in

In short, the legislative history conclusively demonstrates that the language of Section 4(e) is no accident of legislative draftsmanship, but that Congress meant what it so clearly said: licenses on reservations "shall be subject to and contain" the conditions prescribed by the appropriate Secretary "for the adequate protection and utilization" of the reservations.

D. The Commission's Administrative Interpretation has not been Longstanding or Consistent and is not Entitled to Deference

Both the Commission (Br. 33) and petitioners (Br. 37-38) rely on the Commission's prior administrative practice and construction to support their interpretation. This construction, however, has itself been inconsistent and is controverted by longstanding interpretations advanced by other federal agencies. Accordingly, the Commission's interpretation is not entitled to deference. See *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-146 (1976).

In 1929, the Commission's legal staff, in a formal memorandum to the Commission's executive secretary, con-

these matters (*id.* at 280). He did not address what authority the departments would have under Section 4(e). Likewise, Lawson's statement that the Commission already had the power to override a departmental head as to "the consistency of a license with the purpose of any reservation" (*id.* at 358) has no bearing upon a Secretary's authority to condition a license for the adequate protection and utilization of reservation. Section 4(e) makes these two functions separate: the making of a "no interference or inconsistency" finding is the responsibility of the Commission; the promulgation of conditions for the adequate protection and utilization of the reservation is the responsibility of the individual Secretaries. Indeed, in a memorandum to the Commission's executive secretary written one year earlier, Lawson concluded that the Secretary of the Interior had authority under Section 4(d) of the FWPA (now Section 4(e)), apart from his authority as a Commission member, "to prescribe conditions to be inserted in the license for the protection and utilization of the reservation." Memorandum of Sept. 20, 1929, at 23; COR 24,421. See page 33, *infra*.

cluded that the Secretary of the Interior had authority under Section 4(d) of the FWPA (now Section 4(e)) to impose conditions on a license necessary for the adequate protection and utilization of an Indian reservation. Memorandum of Sept. 20, 1929, COR 24,399-24,427. At issue was an application by the Rocky Mountain Power Company for a license to build a power project on the Flathead Indian Reservation. In order to settle certain claims asserted by the United States, the Flathead Indians, and non-Indian settlers on the Flathead Irrigation Project to a power site on the Flathead River, the power company proposed to sell electric energy at reduced rates to the irrigation project. In discussing how the rights of the Indians could be protected in such a settlement, the Commission's legal opinion stated:

In its ordinary jurisdiction over Indian tribal lands, the Federal Power Commission when issuing licenses, has authority to make a finding whether the project "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" and to "fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter." In no case can the provisions of the law be waived as to lands in Indian reservations (Sec. 10(i)). *The function of the Secretary of the Interior in such cases, apart from his membership on the Commission and his authority to designate personnel from his department to perform work for the commission, is, under Sec. 4(d) [now Section 4(e)], to prescribe conditions to be inserted in the license for the protection and utilization of the reservation.*

Memorandum at 23; COR 24,421 (emphasis added).

The Commission (Br. 33) and petitioners (Br. 37) principally rely upon *Pigeon River Lumber Co.*, 1 F.P.C. 206 (1935). That case, however, did not address the portion of the Section 4(e) proviso dealing with secretarial

conditions. The Commission held only that under the first clause of Section 4(e)'s reservation proviso, it is the obligation of the Commission, not the Secretary, to find that the license will not interfere or be inconsistent with the purpose for which the reservation was created. The Commission stated that, in making the no interference/inconsistency determination, it would give great weight to the judgment and recommendation of the Secretary of the Interior. 1 F.P.C. at 209. We agree that this is the plain import of the first clause of the reservation proviso, but we note that the Commission in *Pigeon River* did not address the second clause, dealing with secretarial conditions, which just as plainly vests paramount authority in the respective Secretaries.³⁶

Neither petitioners nor the Commission cite a single instance in which a Secretary's Section 4(e) conditions were rejected by the Commission at any time prior to its 1975 decision in *Pacific Gas & Electric Co.*, 53 F.P.C. 523.³⁷ On the other hand, as early as 1935, the Secretary

³⁶ The *Pigeon River* proceeding involved not the issuance of a license, but an application for a preliminary permit pursuant to Sections 4(f) and 5 of the FPA, 16 U.S.C. 797(f) and 798. Hence, the reservation proviso was not applicable, and no secretarial conditions had been submitted to the Commission. 1 F.P.C. at 209. The Office of Indian Affairs contended that any preliminary permit that might be issued "would be made untenable because of the conditions which the Secretary [of the Interior] would feel impelled to include in the license for the protection of the Indians" (*ibid.*). The Commission did not address this potential problem. Its remarks were confined to the portion of the proviso requiring a finding of non-interference and consistency with the reservation's purposes. Nothing was said about the relative powers of the Secretary and the Commission to impose license conditions. Because the preliminary permit was denied on other grounds (*id.* at 210-211), the Commission had no occasion in *Pigeon River* to discuss the issue presented in this case.

³⁷ The remaining Commission cases which they cite (FERC Br. 33; Pet. Br. 37 n.47) are all distinguishable. In *Pacific Gas & Electric Co.*, 6 F.P.C. 729 (1947), the Commission deferred for further study conflicting recommendations by the Secretary of Agriculture and the California Division of Fish and Game for the support of

of the Interior, through the Office of Indian Affairs, asserted that his Section 4(e) conditions were binding on the Commission. See *Pigeon River*, 1 F.P.C. at 209. Likewise, the Secretary of Agriculture made his views known to Congress in 1968 when it was considering amending Section 15 of the FPA, 16 U.S.C. 808, to authorize the Commission to license projects for nonpower use. The Secretary informed the House Committee that the Commission had agreed to consult with his Department regarding the issuance of any licenses for nonpower purposes that affected national forests. Moreover, the Secretary stated that the Commission had agreed that a license for such use

will be issued only with the consent of this Department and subject to such conditions as we deem necessary for the adequate protection and utilization of the lands under our jurisdiction.

fish life in certain national forests. The Commission's order does not state whether the Secretary's "recommendations" were proffered pursuant to his Section 4(e) conditioning authority or whether the Secretary agreed to further studies. In *Southern California Edison Co.*, 8 F.P.C. 364 (1949), the Commission requested the Secretary of Agriculture to reconsider a special condition requiring a specified water flow over a diversion dam to protect downstream recreation values in the Sequoia National Forest. The Secretary reconsidered the flow requirements in light of evidence submitted by the applicant and imposed a revised condition. *Id.* at 368. The Commission stated that Section 4(e) "authorizes" it to impose "such conditions in a license as the Secretary of Agriculture may deem necessary for the adequate protection and utilization of the national forest involved" (*id.* at 385). Because the Commission agreed with the Secretary's condition, that case did not present the issue involved here. In *Arizona Power Authority*, 39 F.P.C. 955 (1968), the applicant and the Indian tribe entered into an agreement permitting the applicant to use tribal water resources and establishing the amount of compensation therefor. Although the Secretary approved the agreements (*id.* at 958), the Commission did not require as a condition of the license that the applicant obtain the Secretary's approval, in addition to that required by the tribe, to readjustments of water use or compensation. Finally, *Montana Power Co.*, 56 F.P.C. 2008 (1976), involved the term of a license, not a Section 4(e) condition.

H.R. Rep. 1643, 90th Cong., 2d Sess. 14-15 (1968). See also *Pacific Gas & Electric Co.*, 53 F.P.C. at 526 (Secretary of Agriculture asserted that Section 4(e) conditions were binding).

The division of responsibility between the respective Secretaries and the Commission—and the mandatory nature of the secretarial conditions—was also recognized by the report of the Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and to the Congress* 154 (1970) (emphasis added):

[T]he Federal Power Commission is given the ultimate authority to decide whether a project having an impact on a Federal reservation shall be licensed, presumably even over the holding agency's objection (the role fulfilled by Congress for Bureau and Corps' projects), *although the Commission must include such conditions in the license as the holding agency considers necessary.*

This conclusion is especially significant because representatives of the Federal Power Commission served as members of the Advisory Council to the Public Land Law Review Commission established pursuant to 43 U.S.C. (1970 ed.) 1396.³⁸

As the foregoing discussion demonstrates, there is no consistent, longstanding administrative construction of Section 4(e) by the Commission to which to defer. The current interpretations of the affected administrative agencies are in conflict. In these circumstances, prior administrative practice and construction count for naught. See *General Electric Co. v. Gilbert*, 429 U.S. at 140-146.

E. Review of the Reasonableness of the Secretary's Section 4(e) Conditions Properly Rests With the Court of Appeals, not the Commission

The Secretary of the Interior has consistently adhered to the position that his authority under Section 4(e) to

³⁸ See *One Third of the Nation's Land*, *supra*, at vi, vii. Other commentators have also concluded that a Secretary's Section 4(e) conditions are mandatory. See, e.g., Lazarus, *Indian Rights Under The Federal Power Act*, 20 Fed. B.J. 217, 221 (1960).

condition licenses that affect reservations is subject to certain limitations. By its terms, Section 4(e) itself requires that any conditions prescribed by the Secretary for inclusion in a license must be "necessary for the adequate protection and utilization of such reservations." Furthermore, the Secretary's conditions cannot be imposed arbitrarily; they must be reasonable and supported by evidence in the record.

In view of the highly contested nature of the licensing proceeding in this case, the Secretary submitted his proposed conditions for comment early in the administrative proceeding and reserved the right to change or modify them based upon the record as it developed (J.A. 49, 61). During the evidentiary hearing, petitioners and the Commission staff commented upon the proposed conditions. Three high ranking officials from the Department of the Interior testified and, in response to questioning, they agreed to modify and re-examine certain conditions (J.A. 105-201). Subsequently, the Secretary submitted revised conditions accompanied by detailed explanations (J.A. 218-242).

Because the Commission concluded that it was not required to accept the Secretary's conditions as propounded (Pet. App. 143-155), it developed its own conditions for inclusion in the license (*id.* at 170-190, 219-221). On review, the court of appeals concluded only that the Secretary's conditions were binding on the Commission; it did not determine whether the Secretary's conditions were consistent with the statutory mandate, supported by evidence in the record, or reasonable. Hence, the substance of those conditions is not properly before this Court.³⁰

³⁰ We note, however, that neither the Commission in its order nor petitioners in the administrative proceeding challenged the Secretary's conditions on the grounds that they were arbitrary or capricious, or not necessary for the adequate protection and utilization of the reservations. The Commission did criticize the Secretary's conditions for not taking account of petitioners' proposed project (Pet. App. 143-155). But under Section 4(e), the Secretary's only concern is to ensure the adequate protection and utilization of the reservations.

All agree that the Secretary's conditions must be *reasonably* related to the adequate protection and utilization of the affected reservation. Both the Commission (Br. 39-43) and petitioners (Br. 38-39) argue, however, that the FPA's judicial review provision requires the Commission, rather than the court of appeals, to have the initial responsibility for reviewing the Secretary's conditions under the reasonableness standard. This argument is insubstantial.

Judicial review of Commission orders under the FPA is established by Section 313(b) of the FPA, 16 U.S.C. 825l(b), which was first enacted in 1935, 15 years after enactment of Section 4(e). Nothing in Section 313(b) amended Section 4(e), or made any pretense of changing the binding nature of the Secretary's Section 4(e) conditions.

The Commission notes (Br. 40) that its licensing orders are reviewable by the court of appeals to determine whether they have a reasonable basis in law and are supported by substantial evidence. By the same token, we submit, any secretarial conditions that are included in a license, and are thereby made part of the Commission's order, are subject to initial review by the court of appeals under these same standards. That the Commission's orders are reviewable under Section 313(b) only begs the question whether the Secretary's Section 4(e) conditions are binding on the Commission. The statute charges the Secretary, not the Commission, with prescribing conditions that the Secretary deems to be necessary. Moreover, because the Secretary's conditions must be "contain[ed]" in the license, the court of appeals must review those conditions, not the Commission's substitutes. In other words, the Secretary's conditions are entitled to a presumption of validity and must be affirmed if they are supported by substantial evidence and are within the scope of the authority delegated to the Secretary.⁴⁰

⁴⁰ On the other hand, if the Commission denies a license because, in its view, the Secretary's conditions render the proposed project

II. SECTION 4(e)'s RESERVATION PROVISIO PROTECTS THE RESERVED WATER RIGHTS OF THE PAUMA, PALA AND YUIMA RESERVATIONS

Section 3(2) of the FPA, 16 U.S.C. 796(2) (emphasis added), defines the term "reservations" as used in the FPA to mean:

national forests, *tribal lands embraced within Indian reservations*, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; *also lands and interests in lands acquired and held for any public purposes*; but shall not include national monuments or national parks.

The Act's definition of "reservations" does not limit the term to the physical soil itself. It expressly includes "interests in lands" that are owned by the United States or that are "acquired and held for any public purpose." Relying on this broad statutory language, the court of appeals unanimously held that Section 4(e)'s reservation proviso applies not only to those reservations that are physically occupied by the project works, but also to the Pauma, Pala and Yuima Reservations, which are situated in the San Luis Rey River watershed directly downstream from petitioners' diversion dam, and whose water rights are affected by the project (Pet. App. 25-28).⁴¹

Neither the Commission nor petitioners appear to challenge the court of appeals' ruling (Pet. App. 25-26) that the water rights of the downstream reservations are encompassed within the definition of "reservations" in the FPA.⁴² Instead, relying on the portion of the Section

impractical, we assume the disappointed applicant is free to challenge the Commission's order under Section 313(b) by attacking the secretarial conditions.

⁴¹ Judge Anderson, who dissented from the court's other holdings, agreed that Section 4(e)'s reservation proviso applies to the downstream reservations (Pet. App. 33).

⁴² *FPC v. Tuscarora Indian Nation*, 362 U.S. at 114-115, is not to the contrary. *Tuscarora* holds that tribal lands owned in fee by

4(e) proviso that refers to "licenses * * * issued within any reservation", they contend that application of the proviso is limited to reservations physically occupied by the facilities of a project. Although, as the court below noted (Pet. App. 26), "the word 'within' tends to paint a geographical picture," other provisions of the FPA provide evidence that the scope of Section 4(e) is not so limited. For instance, Section 23(b) of the Act, 16 U.S.C. 817, provides that a project on non-navigable waters over which Congress has jurisdiction under its Commerce Clause powers must be licensed by the Commission if any public lands or reservations "are affected" by the project. Section 23(b) thus represents a deliberate congressional choice to invoke the protective provisions of the FPA when a project "affects" a reservation but is not physically "upon any part of" the reservation. It would make no sense to conclude that Congress directed the Commission to exercise its jurisdiction in such instances if Congress did not also intend to afford the "affected" reservation the full benefit of Section 4(e)'s proviso.⁴³

There can be no doubt that issuance of a license to petitioners would "affect" the downstream reservations by impairing the reserved water rights acquired by the Bands when their reservations were created. See *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. United States*, 426 U.S. 128 (1976). The Pala Reservation is located directly on the San Luis Rey River (Pet. App. 308). Although the Pauma and Yuima Reservations are

an Indian Tribe are not "reservations" within the meaning of the FPA because those lands are not "owned by the United States." In contrast, as the court of appeals explained (Pet. App. 25-26), the Bands' water rights and the reservations to which they attach are *property* interests that are owned by the United States.

⁴³ Furthermore, Section 10(e) of the FPA, 16 U.S.C. 803(e), authorizes the Commission to fix annual charges for "the use of * * * tribal lands embraced within Indian reservations." Congress's careful use in this section of only a portion of the definition of "reservations" demonstrates that it was quite capable of limiting the effect of a particular provision of the FPA to lands within the physical boundaries of a reservation when it intended such a result.

not located on the river itself, they overlie the Pauma and Pala Basins, which are groundwater reservoirs providing year-round sources of water (Pet. App. 122). The Commission expressly acknowledged that the project "diverts water into the Escondido Canal which would otherwise percolate into the Pauma and Pala Basins" (*id.* at 123 n.119). The continued diversion of this water, together with the importation of poorer quality water from outside the area, would result in the rapid deterioration of the Basins' groundwater quality (J.A. 208).

Petitioners (Br. 46) and the Commission (Br. 37-38) nevertheless argue that the downstream reservations are not subject to the protections of the Section 4(e) proviso because the Commission is not empowered "to adjudicate" water rights. But adjudication of water rights is a far different matter from formulating conditions for the protection and utilization of a reservation. The Commission itself developed conditions for water deliveries in response to the claims of the Secretary and the Bands that any water that petitioners are licensed to take through Indian lands that could otherwise be used by the Bands "'necessarily interferes with the utilization of the reservation by the Indians'" (Pet. App. 173).⁴⁴ The Commission found ample authority under Section 10(a) of the FPA "to require the modification of water rights incident to a project if such modification is necessary" to enable it to make the no interference/inconsistency determination required by the first clause of the Section 4(e) proviso (Pet. App. 174). Such conditions, the Commission concluded, were the "price in water of the power license issued herein" (*id.* at 176).⁴⁵

⁴⁴ Although, on rehearing, the Commission qualified its prior opinion with equivocal statements (Pet. App. 362-366), the conditions remained unchanged.

⁴⁵ Whatever water rights the licensee brings to the project are effectively submitted to the Commission's disposition upon acceptance of the license. See *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 419-428 (1946).

Amicus Edison Electric Institute contends (Br. 22-23) that the downstream reservations are sufficiently protected by Section 10(a) of the FPA and that there is no need to apply the protections of Section 4(e) to these reservations. See also Pet. Br. 46. Although Section 10(a) does require the Commission to assess the "public interest" (*Udall v. FPC*, 387 U.S. at 450), the availability of Section 10(a) does not render the Section 4(e) reservation proviso superfluous. Section 10(a)'s public interest standard requires a balancing of the many competing interests involved, whereas Section 4(e) embodies a specific congressional mandate designed to protect reservations. As the court of appeals observed (Pet. App. 27-28), it makes no sense to apply Section 4(e)'s protective provisions to a reservation that suffers a minimal physical intrusion, but not to a downstream reservation whose entire water supply may be diverted.

III. PETITIONERS MUST COMPLY WITH THE RIGHT-OF-WAY REQUIREMENTS OF SECTION 8 OF MIRA

At issue here are two intertwined notions: one involving aspects of tribal sovereignty; the other involving Congress's exercise of its power to determine if and how Indian lands may be utilized. This Court has previously recognized that one of the purposes for which Congress created Indian reservations was to set aside territory over which tribes may exercise sovereignty and have "the right * * * to make their own laws and be ruled by them." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). Among the most significant aspects of the sovereignty of an Indian tribe is its inherent power, absent contrary treaty provisions or congressional enactments, to exclude non-members from the reservation. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 410 (9th Cir. 1976); *Powers of Indian Tribes*, 55 Interior Dec. 14, 48-50 (1934).

At the same time, Congress has the power to legislate with respect to tribal use and occupancy of reservation

lands. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *Cherokee Nation v. Southern Kansas Ry.*, 135 U.S. 641, 656 (1890). Congress may, consistent with constitutional limitations (*United States v. Sioux Nations of Indians*, 448 U.S. 371, 415 (1980)), grant interests in Indian lands, including rights-of-way. *Nadeau v. Union Pac. R.R.*, 253 U.S. 442, 446 (1920); *Missouri, K. & T. Ry. v. Roberts*, 152 U.S. 114, 116-117 (1894). But, in construing any statute dealing with the alienation of interests in Indian lands, we cannot lightly assume that Congress meant to dispense with tribal concurrence. And, at all events, the statutory requirements must be strictly followed. See *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550, 552, 556 (9th Cir.), cert. denied, No. 83-180 (Nov. 7, 1983).

A. Prior to Enactment of the FPA, Section 8 of MIRA Provided the Exclusive Method for Obtaining Rights-Of-Way Across Mission Indian Reservations for Water Conveyance Facilities

In the 1890's and early 1900's, Congress enacted a series of statutes authorizing rights-of-way across the public domain for various purposes. Some of these provisions applied generally to federal lands, whether reserved for special purposes or held as public lands.⁴⁶ Other statutes were directed specifically to granting rights-of-way across Indian reservations.⁴⁷ In either case, when the right-of-way affected an Indian reserva-

⁴⁶ See, e.g., Act of Mar. 3, 1891, ch. 561, § 18, 26 Stat. 1101 (former 43 U.S.C. 946) (right-of-way for reservoirs, canals, and laterals); Act of Feb. 15, 1901, ch. 372, 31 Stat. 790 *et seq.* (former 43 U.S.C. 959) (right-of-way for electrical plants, poles and lines for the generation and distribution of electrical power, and for other purposes); Act of Mar. 4, 1911, ch. 238, 36 Stat. 1253 (former 43 U.S.C. 961) (right-of-way for electrical poles and lines for the transmission and distribution of electrical power, and for other purposes).

⁴⁷ See, e.g., Act of Mar. 3, 1901, ch. 832, § 4, 31 Stat. 1084, 25 U.S.C. 311 (highways); Act of Mar. 2, 1899, ch. 374, § 1, 30 Stat. 990, as amended, 25 U.S.C. 312 (railway, telegraph, and telephone lines).

tion, authority to make the grant almost invariably was vested in the Secretary of the Interior. Until 1948, there was no general statutory requirement of tribal consent. That year, Congress enacted a general Indian right-of-way statute, 25 U.S.C. 323 *et seq.*, which consolidated the authority of the Secretary of the Interior to grant rights-of-way across Indian lands (25 U.S.C. 323) and required the consent of most tribes⁴⁸ prior to the grant of a right-of-way across tribal lands (25 U.S.C. 324).⁴⁹ By regulation, the Secretary now requires the consent of all tribes to the granting of rights-of-way over tribal lands. See 25 C.F.R. 169.3(a).

The Mission Indian Relief Act of 1891 represents an exception to the general proposition that tribal consent to rights-of-way was not statutorily required prior to 1948. Section 8 of MIRA, 26 Stat. 714, authorizes rights-of-way across Mission Indian reservations for only two purposes: water conveyance facilities and railroads. With regard to the former, Section 8 provides that, prior to the issuance of a trust patent for a reservation,⁵⁰ the Secretary of the Interior is authorized to grant rights-of-way across the reservation for the construction of water conveyance facilities, but only upon the condition that the Indians owning the reservation "shall * * * be supplied with sufficient quantity of water for irrigating and domestic purposes" (26 Stat. 714). After issuance of any tribal patent, the power to grant a right-of-way is vested directly with the Band:

Subsequent to the issuance of any tribal patent, or of any individual trust patent * * *, any citizen of

⁴⁸ Principally, those tribes organized under the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*

⁴⁹ The 1948 Act supplemented, but did not repeal, prior existing statutes, including the FPA, which authorized rights-of-way across Indian reservations (25 U.S.C. 326).

⁵⁰ Section 1 of MIRA created a commission to select lands suitable for a reservation, after which a trust patent would issue to the Band for the reservation lands, pursuant to Section 3 (26 Stat. 712).

the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

26 Stat. 714.⁵¹

In *Rincon Band of Mission Indians v. Escondido Mutual Water Co.*, Nos. 69-217-S, 72-276-S, and 72-271-S (S.D. Cal. Jan. 10, 1980),⁵² the district court found that "MIRA was an attempt by Congress to deal in a comprehensive fashion with the historical problems that the Mission Indians had experienced in securing reservation lands

⁵¹ Section 8 was not included in the early drafts of MIRA. Its history is partially described in H.R. Rep. 3282, *supra*, at 3. A company had applied for a right-of-way for a ditch across an existing reservation in southern California. The local Indian agent thought the proposal would benefit the Indians, but the Commissioner of Indian Affairs, relying on two opinions of the Attorney General, 18 Op. Att'y Gen. 563 (1887), and 16 Op. Att'y Gen. 552 (1880), replied that there was no statutory authority for granting canal rights-of-way. The Commissioner therefore proposed amending the pending bill to confer authority for granting rights-of-way across the reservations for water conveyance facilities and for short railroad lines. Before the amendment was adopted, the bill died.

The bill was reintroduced in the next Congress, and the Commissioner's amendment was added as a new provision, Section 8, on the House floor. 22 Cong. Rec. 311-313 (1890). In conference, the Senate conferees agreed to the House amendment with the addition of a clause requiring pre-patent secretarial grants of canal rights-of-way to be subject to the condition that the Indians be supplied with a sufficient quantity of water for irrigation and domestic purposes. *Id.* at 554. The House conferees explained that this modification would "better serve and protect the rights and privileges of the Indians in and to their reservation lands." Congress then passed the bill. *Id.* at 786.

⁵² Copies of this opinion have been lodged with the Clerk of the Court. See note 3, *supra*.

free from encroaching white settlers" (slip op. 3). The court concluded (slip op. 11) that Section 8 of MIRA was the "exclusive means" for obtaining canal rights-of-way across Mission Indian Reservations.⁵³ The court explained (slip op. 11):

MIRA's lengthy legislative history reveals that Congress' primary concern in enacting the statute was to safely secure reservation lands for the Mission Indians. The statute sets forth comprehensive procedures for establishing and securing the reservations. Section 8 is properly read as a section designed to protect and preserve the integrity of the reservations once established by creating a specific procedure for permitting others to use Mission Indian lands.

Petitioners argue (Br. 23-26) that Section 8 of MIRA is not the exclusive method for obtaining canal rights-of-way across the Mission Indian Reservations, citing Interior's alleged prior administrative practice. That administrative practice, however, is not entitled to any weight because it did not focus on the effect of Section 8.

Petitioners rely upon a 1908 permit pursuant to 43 U.S.C. 946 granting canal rights-of-way across the reservations (C.A. App. 472), a 1914 contract granting rights-of-way for power generation and transmission purposes (J.A. 22), and the Commission's issuance of the original license for Project No. 176 in 1924 and subsequent license amendments. There is no evidence, however,

⁵³ The district court therefore held that an 1894 contract (J.A. 9-13) that purported to grant a right-of-way across the Rincon Reservation and to limit the Rincon's water rights, was void ab initio for failure to comply with Section 8 of the MIRA. It also held that a 1908 right-of-way permit from Interior was also invalid because it did not comply with Section 8. Although unrelated to Section 8, the court also held that portions of a 1914 contract (J.A. 22-27) between the United States and Mutual and a 1922 contract (J.A. 28-38) between the United States and Vista's predecessor were void ab initio to the extent that they purported to convey or to limit the Bands' water rights (slip op. 24-25).

that when Interior granted the 1908 permit, it considered the effect of Section 8 of MIRA.⁵⁴ The grant of rights-of-way for power transmission purposes in the 1914 contract likewise has no bearing on the applicability of Section 8 to water conveyance facilities because Section 8 does not purport to cover electric transmission lines. Finally, petitioners do not cite any evidence that the Commission or Interior considered the relationship between Section 8 of MIRA and the FPA at any time prior to the initiation of this proceeding in 1969.

Because no agency has ever "focus[ed] closely on the operative impact" of Section 8 of MIRA, prior administrative practice is of no assistance in assessing the application of that statute in this case. *Weinberger v. Salfi*, 422 U.S. 749, 760 n.6 (1975). See *SEC v. Sloan*, 436 U.S. 103, 117-118 (1978).

B. The FPA Did Not Repeal Section 8 of MIRA

Section 8 of MIRA is a specific statute governing rights-of-way for water conveyance facilities across the Mission Indian reservations of California. It was enacted for the express purpose of securing for the Bands a "sufficient quantity of water for irrigating and domestic purposes" (26 Stat. 714). Congress sought to achieve this objective by requiring the Bands' consent to any rights-of-way for water conveyance facilities across their reservations. As we have noted, the provision was designed to prevent non-Indians from encroaching on Mission Indian lands and from stealing Indian water. See pages 2-3, 45-46, *supra*. Presumably, coercive or improvident arrangements would be avoided if both tribal consent and Secretarial approval were required for the granting of canal rights-of-way.

⁵⁴ *Rio Verde Canal Co.*, 27 Interior Dec. 421 (1898), and *United States v. Portneuf-Marsh Valley Irrigation Co.*, 213 F. 601 (9th Cir. 1914), relied upon by petitioners (Br. 24 n.37), did not consider the interplay between 43 U.S.C. 946, a general statute, and Section 8 of MIRA, a specific statute.

In sum, Section 8 of MIRA is a very limited statute addressing a particularized situation with a specific remedy, geographically confined to one small group of Indian reservations in a single state. On the other hand, the FPA is a general statute that authorizes water power development throughout the Nation. As this Court has previously noted, it is a basic principle of statutory construction that a "statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Repeals by implication are not favored in any case. See *United States v. United States Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). But that "cardinal rule" has special force in circumstances like those presented here. Unless it is unavoidable, "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974).⁵⁵

It is beyond question that the primary purpose of Project No. 176 is to convey water, not to produce power. This crucial fact was recognized by the administrative law judge (J.A. 357-366), by the Commission (Pet. App. 132) and by the court of appeals (*id.* at 13), and was virtually conceded by petitioners (J.A. 360-361). That is, of course, the special focus of Section 8 of MIRA: under what conditions should water conveyance facilities be

⁵⁵ The Court explained the reason for this rule:

"[W]hen the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

Radzanower, 426 U.S. at 153 (quoting T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 98 (2d ed. 1874)).

permitted on Mission Indian reservations. In this context, only the clearest indication that Congress so intended would justify disregarding the very specific requirement of tribal consent so pointedly enacted in MIRA.

There is, in fact, no reason whatever to read the FPA as a partial repeal of Section 8 of MIRA. Section 29 of the FPA, 16 U.S.C. 823, is of no assistance in this inquiry, because it does not mention, let alone expressly repeal, Section 8 of MIRA. It only repeals all earlier acts that are "inconsistent" with the FPA. And there is no tension—much less any irreconcilable conflict—between the MIRA requirement of tribal consent for canal rights-of-way and the jurisdiction given to the Commission by the Power Act. Of course, after enactment of the FPA, neither the Mission Indians nor the Secretary could any longer authorize water power projects on reservation lands by simple contract. Henceforth, a Commission license was also required. But there is no ground to suppose the new requirement was meant to erase the older condition of tribal consent. Obviously, the two provisions can co-exist.

Section 4(e) of the Power Act indicates no contrary legislative intent. Authorizing the Commission to issue licenses for project works upon reservations, including Indian reservations, logically does not preclude tribal consent where Congress has previously legislated such a requirement. Indeed, as the court of appeals concluded, the insistence of Section 4(e) that "the license will not interfere or be inconsistent" with the reservation's purpose "would be meaningless if Congress meant to extinguish preexisting Indian rights wherever they came into conflict with the Commission's comprehensive jurisdiction over power projects on federal lands" (Pet. App. 21, citing *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. FPC*, 510 F.2d 198, 210-212 (D.C. Cir. 1975)).

The legislative history of the FPA cited by the Commission (Br. 27) and petitioners (Br. 14-16) is no more persuasive. A proposed amendment would have required

tribal consent to the use of reservation lands for power projects in the case of Indians whose reservations were created by treaty. See 59 Cong. Rec. 1564 (1920). Although initially adopted by the Senate, the amendment was deleted in conference. See H.R. Rep. 910, 66th Cong., 2d Sess. 8 (1920). In deleting this amendment, however, Congress merely rejected adding a *new* requirement that would have "singled out" water power from all other uses of reservation lands for tribal consent (*ibid.*).⁵⁶ It hardly follows that Congress also meant to extinguish already existing consent requirements under other laws, applicable to non-treaty reservations, like those of the Mission Indians.

In sum, there is no evidence of a "clear and manifest" intent by Congress to repeal Section 8 of MIRA. In addition to complying with the FPA, therefore, petitioners must also obtain the consent of the Bands whose reservations are traversed by its water conveyance facilities.

⁵⁶ Because the amendment passed the Senate and was only deleted in conference, the views expressed during the Senate debates by opponents of the amendment are entitled to little, if any, weight in assessing Congress's intent in rejecting the amendment. In other words, the legislative history marshalled by petitioners and the Commission cannot carry the day, because its significance is apparent only "through strained processes of deduction from events of wholly ambiguous significance, [which] furnish dubious bases for inference in every direction." *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945). Instead, the Conference Report, which "represents the final statement of terms agreed to by both houses [is], next to the statute itself[,] * * * the most persuasive evidence of congressional intent." *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981) (MacKinnon, J.).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

1. The Federal Power Act, 16 U.S.C. 791a *et seq.*, provides in pertinent part:

a. Section 3(2), 16 U.S.C. 796(2):

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks[.]

b. Section 4(e), 16 U.S.C. 797(e):

The Commission is authorized and empowered—

* * * * *

(e) * * * To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided:

Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

c. Section 10(a) and (g), 16 U.S.C. 803(a) and (g):

All licenses issued under this subchapter shall be on the following conditions:

(a) * * * That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * *

(g) * * * Such other conditions not inconsistent with the provisions of this chapter as the commission may require.

d. Section 18, 16 U.S.C. 811:

The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this chapter, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of the Army; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon

conviction thereof shall be punished as provided in section 825o of this title.

e. Section 23(b), 16 U.S.C. 817:

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works, across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam

or other project works in such stream upon compliance with State laws.

f. Section 29, 16 U.S.C. 823:

All Acts or parts of Acts inconsistent with this chapter are repealed: *Provided*, That nothing contained herein shall be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, granting certain rights-of-way to the city and county of San Francisco, in the State of California.

2. The Mission Indian Relief Act, ch. 65, 26 Stat. 712 *et seq.*, provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That immediately after the passage of this act the Secretary of the Interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided.

SEC. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior. They shall also appraise the value of the improvements belonging to any person to whom valid existing rights have attached under the public-land laws of the United States, or to the assignee of such person, where such improvements are situated within the limits of any reservation selected and defined by

said commissioners subject in each case to the approval of the Secretary of the Interior. In cases where the Indians are in occupation of lands within the limits of confirmed private grants, the commissioners shall determine and define the boundaries of such lands, and shall ascertain whether there are vacant public lands in the vicinity to which they may be removed. And the said commission is hereby authorized to employ a competent surveyor and the necessary assistants.

SEC. 3. That the commissioners, upon the completion of their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use ~~and~~ benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty but patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever: *Provided*, That no patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain, unless such person shall acquiesce in and accept the appraisal provided for in the preceding section in all respects and shall thereafter, upon demand and payment of said appraised value, execute a release of all title and claim thereto; and a separate patent, in similar form, may be issued for any such tract or tracts, at any time

thereafter. Any such person shall be permitted to exercise the same right to take land under the public-land laws of the United States as though he had not made settlement on the lands embraced in said reservation; and a separate patent, in similar form, may be issued for any tract or tracts at any time after the appraised value of the improvements thereon shall have been paid: *And provided further*, That in case any land shall be selected under this act to which any railroad company is or shall hereafter be entitled to receive a patent, such railroad company shall, upon releasing all claim and title thereto, and on the approval of the President and Secretary of the Interior, be allowed to select an equal quantity of other land of like value in lieu thereof, at such place as the Secretary of the Interior shall determine: *And provided further*, That said patents declaring such lands to be held in trust as aforesaid shall be retained and kept in the Interior Department, and certified copies of the same shall be forwarded to and kept at the agency by the agent having charge of the Indians for whom such lands are to be held in trust, and said copies shall be open to inspection at such agency.

SEC. 4. That whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation, in quantity as follows: To each head of a family not more than six hundred and forty acres nor less than one hundred and sixty acres of pasture or grazing land, and in addition thereto not exceeding twenty acres, as he shall deem for the best interest of the allottee, of arable land in some suitable locality; to each single person over twenty-one

years of age not less than eighty nor more than six hundred and forty acres of pasture or grazing land and not exceeding ten acres of such arable land.

SEC. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That these patents, when issued, shall override the patent authorized to be issued to the band or village as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in each of the village patents.

SEC. 6. That in cases where the lands occupied by any band or village of Indians are wholly or in part within the limits of any confirmed private grant or grants, it shall be the duty of the Attorney-General of the United States, upon request of the Secretary of the Interior, through special counsel or otherwise, to defend such Indians in the rights secured to them in the original grants from the Mexican Government, and in an act for the government and protection of Indians passed by the legislature of the

State of California April twenty-second, eighteen hundred and fifty, or to bring any suit, in the name of the United States, in the Circuit Court of the United States for California, that may be found necessary to the full protection of the legal or equitable rights of any Indian or tribe of Indians in any of such lands.

SEC. 7. That each of the commissioners authorized to be appointed by the first section of this act shall be paid at the rate of eight dollars per day for the time he is actually and necessarily employed in the discharge of his duties, and necessary traveling expenses; and for the payment of the same, and of the expenses of surveying, the sum of ten thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated.

SEC. 8. That previous to the issuance of a patent for any reservation as provided in section three of this act the Secretary of the Interior may authorize any citizen of the United States, firm, or corporation to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such reservation for agricultural, manufacturing, or other purposes, upon condition that the Indians owning or occupying such reservation or reservations shall, at all times during such ownership or occupation, be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior, and upon such other terms as he may prescribe, and may grant a right of way for rail or other roads through such reservation: *Provided*, That any individual, firm, or corporation desiring such privilege shall first give bond to the United States, in such sum as may be required by the Secretary of the Interior, with good and sufficient sureties, for the performance of such

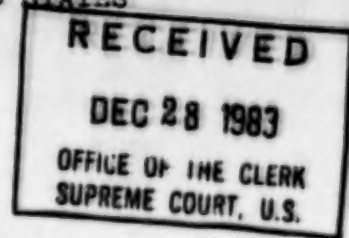
condition precedent to the granting of such authority: *And provided further*, That this act shall not authorize the Secretary of the Interior to grant a right of way to any railroad company through any reservation for a longer distance than ten miles. And any patent issued for any reservation upon which such privilege has been granted, or for any allotment therein, shall be subject to such privilege, right of way, or easement. Subsequent to the issuance of any tribal patent, or of any individual trust patent as provided in section five of this act, any citizen of the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 82-2056



ESCONDIDO MUTUAL WATER COMPANY, ET AL., PETITIONERS

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA AND PALA
BANDS OF MISSION INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR DIVIDED ARGUMENT

Pursuant to Rule 38.4 of the Rules of this Court, the Solicitor General, on behalf of all the parties, moves that the time for argument allotted to petitioners and respondents in this case be divided, and that counsel for petitioners and the Federal Energy Regulatory Commission each be allowed 15 minutes to argue for reversal of the judgment below and counsel for the Mission Indian Bands and the Secretary of the Interior each be allowed 15 minutes to argue for affirmance of the judgment below.

The instant case involves a challenge by the Mission Indian Bands and the Secretary of the Interior to a license issued by the Federal Energy Regulatory Commission permitting the Escondido Mutual Water Company and the other petitioners to operate a small hydroelectric project near Escondido, California. The court of appeals reversed the Commission's order issuing the license, holding: (1) that, under Section 8 of the Mission Indian Relief

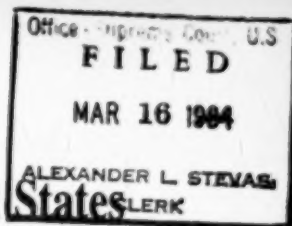
Act (26 Stat. 714), the licensees are required to obtain right-of-way permits from three of the Mission Indian Bands before they may utilize the project facilities that occupy those reservations; (2) that the Commission was without authority to modify or reject any of the license conditions propounded by the Secretary of the Interior pursuant to Section 4(e) of the Federal Power Act (15 U.S.C. 797(e)); and (3) that, for purposes of Section 4(e), the license is not only "within" those reservations that the project traverses, but is also within those reservations whose water rights may be affected by the project because of their location directly downstream from the project.

The Federal Energy Regulatory Commission has filed a brief in this case urging reversal of the court of appeals' decision, and the Solicitor General intends to file a brief for the Secretary of the Interior urging affirmance of that decision. Each of the other parties has an important interest in the outcome of this case, and the views of the parties on the same side of the case are somewhat divergent with respect to certain issues. Accordingly, we believe that oral presentation of the positions of each of the parties would be of assistance to the Court.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1983



No. 82-2056
IN THE
Supreme Court of the United States

October Term, 1983

ESCONDIDO MUTUAL WATER COMPANY, *et al.*,

Petitioners.

vs.

LA JOLLA BAND OF MISSION INDIANS, *et al.*,

Respondents.

On Certiorari to the United States
Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

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Questions Presented.

1. Does the Act of January 12, 1891, 26 Stat. 712, MIRA¹ permit the Mission Indian Bands to veto the Commission's decision to relicense a federal power project by withholding consent to the continued use of reservation lands?
2. Does section 4(e) of the Federal Power Act permit the Secretary of the Interior to veto the Commission's decision to relicense a federal power project by imposing unreasonable conditions on the continued use of reservation lands?
3. Are Indian "water rights" a "reservation" within the meaning of section 4(e) of the Federal Power Act?

¹"MIRA" refers to the Mission Indian Relief Act.

References to the record are abbreviated per Petitioners' initial brief. (PB 1 n.2) Other briefs are abbreviated: Interior (IB), Bands (BB), Commission (FERC B), American Public Power Ass'n, *et al.* (APPA B), Edison Electric Inst. (EEI B), and National Wildlife Ass'n, *et al.* (NWF B).

All section references are to the Federal Power Act (FPA); parallel U.S. Code citations are in the Table of Authorities.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement of the Case	1
Argument	3

I.

Indian Consent Is Not Required for the Use of Reservation Land for Federal Power Projects	3
A. The FPA Does Not Require Such Consent	3
B. MIRA Section 8 Does Not Require Such Consent	7

II.

Interior's Conditions Are Not Mandatory	11
A. Section 4(e)'s Conditions Proviso Cannot Be Read in Isolation	11
B. An Interior Veto Is Unworkable	13
C. An Interior Veto Would Be Inappropriate in This Case	14
1. Making Interior's Conditions Mandatory Would Violate Petitioners' Right to Due Process	14
2. Interior's Conditions Are Not Mandatory on Relicensing	16
3. Interior's Conditions Are Not Mandatory for Minor Projects	18

III.

Indian Water Rights Are Not a "Reservation" for Section 4(e) Purposes	18
Conclusion	20

TABLE OF AUTHORITIES

Cases	Page
<i>Apis v. United States</i> (1898 S.D. Cal.) 88 F. 931	9
<i>Chemehuevi Tribe of Indians v. Federal Power Comm'n</i> (1975) 420 U.S. 395	3, 5, 11, 19
<i>Cherokee Tobacco [The]</i> (1871) 78 U.S. (11 Wall.) 616	4
<i>Church of the Holy Trinity v. United States</i> (1892) 143 U.S. 457	11
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> (1971) 401 U.S. 402	13
<i>Federal Power Comm'n v. Tuscarora Indian Nation</i> (1960) 362 U.S. 99	19
<i>Federal Power Comm'n v. Union Electric Co.</i> (1965) 381 U.S. 90	11
<i>First Iowa Hydroelectric Coop. v. Federal Power Comm'n</i> (1946) 328 U.S. 152	13
<i>Kansas Cities v. Federal Energy Regulatory Comm'n</i> (1983 D.C. Cir.) 723 F.2d	17
<i>Lac Courte Oreilles Band v. Federal Power Comm'n</i> (1975 D.C. Cir.) 510 F.2d 198	7
<i>Lone Wolf v. Hitchcock</i> (1903) 187 U.S. 553	4, 5
<i>Montana Power Co. v. Federal Power Comm'n</i> (1970 D.C. Cir.) 445 F.2d 739, cert. denied (1971) 400 U.S. 1013	16
<i>Montana Power Co. v. Federal Power Comm'n</i> (1972 D.C. Cir.) 459 F.2d 863, cert. denied (1972) 408 U.S. 930	12
<i>NLRB v. Federbush Co.</i> (1941 2d Cir.) 121 F.2d 954	11
<i>Pacific Gas & Electric Co.</i> (1975) 53 FPC 523	17
<i>Reiter v. Sonotone</i> (1979) 442 U.S. 330	18

	Page
Rosebud Sioux Tribe v. Kneip (1977) 430 U.S. 584	
.....	3, 5
Securities & Exchange Comm'n v. Chenery Corp. (1947)	
332 U.S. 194	14
Shell Oil Co. v. Federal Power Comm'n (1964 3d Cir.)	
334 F.2d 1002	15
Solem v. Bartlett (1984) ____ U.S. ____, 52 U.S.L.W.	
4257	3, 5
Southern Union Gas Co. v. Federal Power Comm'n	
(1976 D.C. Cir.) 536 F.2d 440	17
Swanson Mining Corp. (1982) 20 FERC ¶61,229	12
Thomas v. Gay (1898) 169 U.S. 264	4
United States v. Portneuf-Marsh Valley Irrigation Co.	
(1914 9th Cir.) 213 F. 601	8
United Steelworkers of America v. Weber (1979) 443	
U.S. 193	11
Ute Indian Tribe v. State of Utah (1983 10th Cir.) 716	
F.2d 1298	5
Winters v. United States (1908) 207 U.S. 564	19
Wong Yank Sung v. McGrath (1949) 339 U.S. 33	
.....	15, 16

Statutes

Act of January 12, 1891, 26 Stat. 712 (Mission Indian Relief Act (MIRA))	i, 7, 8, 9, 10
Act of March 3, 1891, 26 Stat. 1095, 43 U.S.C. §946	
.....	7, 8, 10
Act of May 14, 1896, 29 Stat. 120, 43 U.S.C. §957	
.....	10
Act of February 15, 1901, 31 Stat. 790, 43 U.S.C. §959	
.....	9
Act of March 4, 1911, 36 Stat. 1253, 43 U.S.C. §961	
.....	9

	Page
Crow Allotment Act of June 4, 1920, 41 Stat. 751	5, 6
Title II of Act of August 26, 1935, 49 Stat. 838, Public Utility Act of 1935, 16 U.S.C. §791a, et seq. (Federal Power Act (FPA))	
§3(2), 16 U.S.C. §796(2)	3
§4(e), 16 U.S.C. §797(e)	<i>passim</i>
§10(a), 16 U.S.C. §803(a)	12, 17
§10(e), 16 U.S.C. §803(e)	3, 12
§10(g), 16 U.S.C. §803(g)	17
§10(i), 16 U.S.C. §803(i)	3, 18
§11(a), 16 U.S.C. §804(a)	12
§15(a), 16 U.S.C. §808(a)	17
§17(a), 16 U.S.C. §810(a)	3
§18, 16 U.S.C. §811	12
§23(b), 16 U.S.C. §817	18
§30(c), 16 U.S.C. §832a(c)	12
§313(b), 16 U.S.C. §825/(b)	13, 17
25 U.S.C. §§323-328	6

Legislative Materials

H.R. Rep. No. 910, 66th Cong., 2d Sess. (1920)	3, 4
H.R. Rep. No. 91-78, 91st Cong., 1st Sess. (1969)	6
H.R. Ex. Doc. No. 45, 50th Cong., 1st Sess. (1887)	2
S. Rep. No. 219, 66th Cong., 1st Sess. (1920)	5
S. Rep. No. 823, 80th Cong., 2d Sess. (1948)	6
Senate Ex. Doc. No. 118, 51st Cong. 1st Sess. (1890)	7
22 Cong. Rec. 310 (1890)	2

	Page
22 Cong. Rec. 311 (1890)	2, 7
58 Cong. Rec. 7174 (1919)	5
58 Cong. Rec. 7175 (1919)	5
59 Cong. Rec. 1534 (1920)	4
59 Cong. Rec. 1564 (1920)	6
59 Cong. Rec. 1565 (1920)	4
59 Cong. Rec. 1566 (1920)	5
59 Cong. Rec. 1569 (1920)	4
59 Cong. Rec. 1568 (1920)	5

Administrative Materials

Icicle Canal Co. (1916) 44 Int. Land Dec. 511	9
H. W. O'Melveny (1897) 24 Int. Land Dec. 560	10
Rio Verde Canal Co. (1898) 27 Int. Land Dec. 421	8

Miscellaneous Texts

Federal Indian Law (1958 Ed. Dept. of Interior)	15
G. Orwell, 1984 (1949 Harcourt Brace & Co. Ed.)	14
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No. 82-2056
IN THE
Supreme Court of the United States

October Term, 1983

ESCONDIDO MUTUAL WATER COMPANY, *et al.*,

Petitioners,

vs.

LA JOLLA BAND OF MISSION INDIANS, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF.

STATEMENT OF THE CASE.

Several of Respondents' statements, while technically correct, are misleading because relevant facts are omitted.² Respondents'

²Interior states that no project water has been delivered to certain reservations. (IB 6) It omits that: La Jolla never has been irrigated from the river (PA 48); future irrigation development on it would be extremely difficult (PA 177); San Pasqual is partly outside the San Luis Rey watershed, has no irrigated farming, and, obtains its water from other sources. (PA 49, 178) It omits that Pala and Pauma receive substantial runoff below the Escondido diversion (See Test. of Bands' Witness Stetson, NJA 2140-41); Pauma's historic source of water is a downstream tributary, Pauma Creek (COR 4596-97); and except for 160 acres, all of Pala was added after Escondido commenced diversions. (NJA 2546-54)

The statement that Petitioners have alternative water supplies (IB 6) incorrectly implies that the Bands could not also have alternative sources. (See COR 5631, 5646, 5767; see also remarks of ALJ Ellis, COR 5784)

Interior states that except for San Pasqual no Band received compensation for the use of its land. (IB 6) It disregards other benefits: flood control protection provided by Henshaw Dam (NJA 3207, 3210-11); releases of water which permit the existing recreational development on La Jolla (NJA 3209-10); water deliveries to Rincon where it can be used directly for irrigation (NJA 3211-12); and, power deliveries to Rincon for pumping purposes at extremely low rates. (NJA 3211-12) In fact, until 1957, when three acres of additional San Pasqual land was used, Interior always told the Commission that additional annual charges were unnecessary because the license incorporated the 1914 contract. (See PB 25)

one-sided³ description of the alleged "plight" (IB 2-3) and "historical nightmare" (BB 10) of the Bands' ancestors should not color the Court's consideration of the issues. Little is gained from a debate about what living conditions and cultural patterns existed a century ago; nothing suggests that Project 176 has caused or will cause any detriment to the Bands.⁴

³During House debate on MIRA Congressman Vandever (who represented the district where the Mission Indians lived, 22 Cong. Rec. 310 (1890)) gave another view of this "plight." He discounted as fanciful, Helen Hunt Jackson's accounts, and noted that most of the bill's proponents lacked first-hand knowledge. (*Ibid.*) Although stating: "I have no disposition to do these Indians a wrong" (*Ibid.*), he adduced facts which showed that many of the Indians' problems were self-inflicted. (*Id.* at 310-11)

Support for his view is contained in the August 17, 1887 Report of the Mission Indian Agent (*See* House Report Ex. Doc. 45, 50th Cong., 1st Sess. (December 24, 1887) Report of the Secretary of Interior, vol. 2 (1887-88), 91-94). In contrast to the Report cited by the Bands (BB 13 n.6), this agent reported that the Indians were neither industrious nor self-reliant. (*Id.* at 92) He also minimized the trespasser problem (BB 7 n.1 and 11 n.5), stating:

"Although there have been many trespassers on their lands yet there is not a single industrious Indian who has not been able to get more land than he could cultivate" (*Id.* at 91)

⁴The Commission noted:

"The Rincon, Pauma and Pala Indian Reservations overlie . . . underground storage reservoirs providing year-round sources of water . . . [that] always [have] been and still [are] equally available to those Bands and to their neighboring landowners, [who] have developed their citrus and avocado orchards notwithstanding the diversion of the San Luis Rey water for more than a half-century. . . . [T]he fact that the . . . Bands have not developed their reservations to the same extent as their non-Indian neighbors, indicate . . . that the Bands are not now prepared to carry out their ambitious agricultural program and take on the responsibilities of Project No. 176. While their reservations are barren, it is not because Project No. 176 has deprived them of water." (emphasis added unless otherwise indicated) (PA 122; see also JA 47-48, and 69 (Test. of Bands' Witness Stetson and Interior Witness Kunkle that water had always been available))

ARGUMENT.

I.

INDIAN CONSENT IS NOT REQUIRED FOR THE USE OF RESERVATION LAND FOR FEDERAL POWER PROJECTS.

The issue of Indian consent cannot be resolved by relying on generalized notions of Indian sovereignty. (BB 35-39, 46; IB 42) The key inquiry is what was Congress' intent.⁵

A. The FPA Does Not Require Such Consent.

The FPA expressly provides for the incorporation of Indian lands into federal power projects. (See §§3(2), 4(e), 10(e), 10(i) and 17(a); PB 12-14) As Judge Anderson concluded below: "I cannot conceive of a more direct and specially tailored scheme for the appropriation of Indian lands than the FPA." (PA 36)

Congress debated and rejected an amendment to the FPA that would have required Indian consent to the use of their lands.⁶ (See PB 14-18) Respondents downplay this striking evidence of Congressional intent by dismissing the remarks of individual senators as not probative, insisting that the conferees' report is "the most persuasive evidence of Congressional intent." (BB 44 n.28; IB 40 n.56) They fail to note that two of the five Senate conferees, Meyers and Nelson (see H.R. Rep. No. 910, 66th Cong., 2d

⁵To determine its intent, "the face of the Act," the "surrounding circumstances", and the "legislative history" must be examined. *Rosebud Sioux Tribe v. Kneip* (1977) 430 U.S. 584, 587. Other indicia of intent are administrative interpretations of the statute by those charged with its implementation (*Chemehuevi Tribe of Indians v. Federal Power Comm'n* (1975) 420 U.S. 395, 409-10) and subsequent legislation. *Solem v. Bartlett* (1984) ____ U.S. ____, 52 U.S.L.W. 4257, 4259.

⁶Interior's argument that section 4(e) incorporates MIRA section 8's "consent" requirement (IB 49) is illogical. After deleting an Indian consent proviso in 4(e), Congress could not have intended that section 4(e) would nevertheless impliedly incorporate such consent. The lack of a consent requirement has not rendered section 4(e) meaningless because the Commission has refused to license projects that substantially physically intrude on a reservation. (PB 19-20) Here, as the Bands ironically concede, the "encroachments" are on their "mountain land [which is] worthless for any purpose" (BB 9)

Sess. (1920) at 8), strenuously opposed the Indian consent amendment during debate.⁷

Contrary to the Bands' implication (BB 44), the senators were familiar with court decisions respecting Indian sovereignty, and understood that Congress had plenary power over Indian lands and could dispose of them without Indian consent. (See, e.g., 59 Cong. Rec. at 1565 (remarks of Curtis: "[T]he Supreme Court has decided that the Congress has the right to pass laws disposing of [Indian] property without their consent"); *Id.* at 1569 (remarks of Nugent: "I am somewhat familiar with the decisions of the Supreme Court . . . referred [to] yesterday, [including] . . . the Cherokee Tobacco case,¹⁸¹ . . . Thomas against Gay¹⁹¹ and . . . Lone Wolf against Hitchcock."))¹⁹⁰ Senator Curtis even closed the debate on the amendment by quoting from *Lone Wolf*. (PB 16)

The conferees' statement that they "saw no reason why water power should be singled from all other uses of Indian reservation land for special action of the council of the tribe" (H.R. Rep. No. 910, *supra* at 8) merely reflects their knowledge that after *Lone Wolf*, *supra*, Congress had plenary power to dispose of

⁷See, e.g., 59 Cong. Rec. 1534 (1920) (remarks of Nelson: "I do not believe in that amendment. It would allow a few Indians to hold up an improvement"); *Id.* at 1565 (remarks of Meyers: "If this amendment becomes a law, . . . Indians [could] arbitrarily . . . block a [power project] They would have an absolute power of veto.") Thus, contrary to the Bands' assertions (BB 44), at least two of the conferees stated that an Indian consent requirement would be inconsistent with the FPA and that Indian interests should be subordinate to power development.

¹⁸¹In *The Cherokee Tobacco* (1871) 78 U.S. (11 Wall.) 616, the Court held that a general federal revenue act superseded earlier Indian treaty rights.

¹⁹¹In *Thomas v. Gay* (1898) 169 U.S. 264, the Court held that the act creating the territory of Oklahoma prevailed over the provision of an Indian treaty.

¹⁹⁰In *Lone Wolf v. Hitchcock* (1903) 187 U.S. 553, the Court held that Congress had plenary power to dispose of Indian lands without their consent in abrogation of a prior treaty.

Indian lands for any purpose without their consent."¹¹ Under the circumstances they saw no need to single out water power purposes for different treatment.¹²

The amendment's failure does not mean that it should be ignored. (See, e.g., *Chemehuevi*, *supra*, 420 U.S. at 410 (In deciding that FPA was not intended to give Commission jurisdiction over thermal power plants the Court noted that later Congresses had refused to amend the act to include such licensing authority).) The significance of the amendment's failure was not lost on its sponsor, Senator Nugent, who recognized that without it "the water power commission will have authority to take from these Indians the lands ceded to them by the United States by treaty without their consent" (59 Cong. Rec. 1566.)

Congress' intent also is evidenced by its action on a contemporaneous bill which became the Crow Allotment Act of June 4, 1920, 41 Stat. 751. At one time section 10 of the bill required Indian consent to the leasing of water-power sites on tribal lands.¹³ Senator Meyers opposed the consent requirement:

"When it comes to . . . lands . . . valuable for water-power development, I do not believe that their disposition ought to be controlled by Indians . . . I do not believe that they ought to have the power to veto any disposition of those lands and lock up their possibilities forever." (58 Cong. Rec. 7175)

¹¹This interpretation is consistent with remarks made during the amendment's debate with at least two of the Senate conferees present. (See, e.g., 59 Cong. Rec. at 1568 (remarks of Senator Walsh: "[S]ince that decision of the Supreme Court [in *Lone Wolf*], Congress has acted on it and disposed of lands within Indian reservations as in its wisdom seemed best."))

¹²Congressional knowledge of *Lone Wolf* has been held significant in determining Congressional intent. (See, e.g., *Solem v. Bartlett*, *supra*, 52 U.S.L.W. at 4259 n.11; *Rosebud Sioux Tribe v. Kneip*, *supra*, 430 U.S. at 668 n.13 and 669; *Ute Indian Tribe v. State of Utah* (1983 10th Cir.) 716 F.2d 1298, 1310 (In acts passed in 1903 and later, Congress relied on *Lone Wolf* and eliminated requirements of Indian consent in dealing with reservation lands)).

¹³See 58 Cong. Rec. 7174 (1919); S. Rep. No. 219, 66th Cong., 1st Sess. (1920) at 3.

Interior also opposed the Indian consent provision.¹⁴ It was omitted from the final Act. (41 Stat. 751)

After the FPA's enactment, Congress twice refused to impose an Indian consent requirement on the use of Indian lands under the FPA. The 1948 general Indian right-of-way act, 25 U.S.C. sections 323-328, expressly exempted the FPA from a tribal consent requirement.¹⁵ (PB 17; 25 U.S.C. 326)

A later attempt to impose a tribal consent requirement on the FPA *failed* when Congress did not act on a 1969 Committee Report (BB 35-36) which recommended that Congress amend the 1948 Act "to require tribal consent to *all* right-of-way grants of tribal land. . . . (H.R. Rep. No. 91-78, 91st Cong., 1st Sess. (1969) 4; see PB 17-18)

¹⁴In a letter to the House Committee on Indian Affairs, (quoted in the 1920 FPA debate) Interior stated:

"I recommend that [the consent] proviso be eliminated. The interest of the Indians are carefully looked after by this department, and in a matter like water-power development, involving . . . a use of both Indian and public lands in the largest and best water-power development possible, *it should not be necessary that the matter be submitted to the approval of the Indians before water-power development can be secured.*

. . . .
The [FPA] . . . provides a general and comprehensive plan for the leasing and development of water-power sites upon . . . Indian reservations That measure amply takes care of the matter of leasing and use of such sites in Indian reservations, and in my opinion this [Crow] bill should go no further than to reserve the sites and should impose no restrictions or conditions upon the leasing thereof." (59 Cong. Rec. 1564)

¹⁵The assertion that 25 U.S.C. section 326 only "means that uses of tribal lands for hydroelectric projects cannot be authorized without the Commission's approval" (BB 40 n.24) ignores the section's express purpose of preserving the FPA as right-of-way authority for power purposes. See S. Rep. No. 823, 80th Cong., 2d Sess. 4 (1948) (Letter from Interior proposing the language finally enacted and pointing out that it preserves "existing statutory authority relating to rights-of-way over Indian lands.")

The Commission always has interpreted section 4(e) as authorizing it to license the use of Indian lands without their consent.¹⁶ (PB 18) For more than fifty years Interior agreed. (PB 24-25) The Bands ignore this consistent, longstanding interpretation. Interior takes issue with this interpretation only insofar as it is evidence that *MIRA section 8* does not require consent.

B. MIRA Section 8 Does Not Require Such Consent.

MIRA section 8 was not intended to require Indian consent to all uses of their land. (PB 21-22)¹⁷ Thus, to the extent that it was

¹⁶The Bands (BB 17-18 and 17 n.9) misread the 1929 Memorandum from Commission Attorney Lawson, concerning a proposal to develop the Flathead power site. At the outset, he explains:

“There are no *legal* rights of settlers or Indians to be considered, as properly distinguished from *equitable* rights, the power of Congress to do as it pleases with the property of the Indians, despite prior laws and treaties, being incontestible. I therefore deal only with the equities of the settlers and Indians.”

“The lands having particular value for power are tribal lands of the Flatland Indians and are subject to the general jurisdiction of the Federal Power Commission to issue licenses under the Federal Water Power Act.” (COR 24,401-02) (emphasis in original)

¹⁷Although MIRA was intended to provide the Bands a permanent home, it was not intended to prevent all encroachments by non-Indians. Section 8's purpose was to permit — not prevent — non-Indians to use the reservations for canal, road and railroad purposes. See Senate Ex. Doc. No. 118, 51st Cong., 1st Sess. (1890) which includes a letter from the Commissioner of Indian Affairs stating:

“The lands set apart and reserved for the Indians ought not to stand in the way of the development and occupations of the surrounding county where no interests of the Indians can be injured thereby.” (*Ibid.* at 11)

MIRA probably would not have passed without section 8. Congressman Vandever (*supra* n.3) originally opposed MIRA (22 Cong. Rec. 311 (1890)) because it did not balance Indian and non-Indian interests. After MIRA was amended to authorize use of Indian lands, Vandever apparently receded from his opposition. (*Ibid.*)

The argument (BB 11 n.5, 13-14) that Congress was skeptical of Interior's ability to protect the Indians and believed that the Indians

not superseded or repealed by the FPA¹⁸ or other Indian right-of-way statutes,¹⁹ it is merely an alternative²⁰ method for obtaining

should determine whether rights-of-way should be granted is wrong. When Congress passed MIRA section 8, it did not require Indian consultation, much less consent, prior to the issuance of a patent. After issuance of a patent, the operative words are "may contract." Interior, not the Bands, has final authority to approve or disapprove a right-of-way.

Further, the *same* Congress gave Interior unilateral authority to grant rights-of-way across reservations in the Act of March 3, 1891, 43 U.S.C. section 946. (See *Rio Verde Rio Verde Canal Co.* (1898) 27 Int. Land Dec. 421, 425 (Congress did not intend that the intervention of Indian reservations should prevent the construction of canals and ditches to irrigate the arid west)).

¹⁸The FPA is a complete and self-contained Act for obtaining rights-of-way for power purposes across Indian and other public lands. (PB 30-31) If Petitioners had simply an irrigation canal, and they decided not to proceed under other acts (e.g., March 3, 1891 Act) they may have contracted for a right-of-way with the Bands pursuant to MIRA. Petitioners, however, have a jurisdictional federal power project. They were bound to proceed under the FPA to obtain their right to use the Bands' lands, and they were not required to contract with the Bands or obtain their consent in so doing. (PB 21-22) Contrary to Respondents' assertions (BB 41; IB 49), to the extent MIRA section 8 applies and requires Indian consent it is obviously most "inconsistent" and therefore repealed by section 29. (See PB 28-32)

¹⁹MIRA section 8 was repealed or superseded by the Act of March 3, 1891, and other subsequent general legislation. (See PB 22-24) Interior's attempt (IB 47 n.54) to distinguish *Rio Verde Canal Co.*, *supra*, and *United States v. Portneuf-Marsh Valley Irrigation Co.* (1914 9th Cir.) 213 F. 601, is unavailing. There, the Act of March 3, 1891, *supra*, was held to have superseded two treaties which had been confirmed by specific Acts of Congress.

To the extent that the District Court has made contrary interlocutory rulings (IB 4 n.3, 45-46), it erred. Like the Ninth Circuit, it froze time and events as they existed when MIRA was passed and failed to give effect to later Congressional acts which repealed it or provided alternative methods for obtaining rights-of-way across Indian reservations. (PB 23 n.35)

²⁰Interior apparently concedes that after enactment of the FPA, MIRA section 8 no longer provided the exclusive method for obtaining rights-of-way across Mission Indian reservations for water conveyance facil-

rights-of-way across Mission Indian lands.

The Bands are unable to distinguish (BB 42 n.26) the cases in which Courts have given effect to a statute permitting a right-of-way across Indian lands without Indian or secretarial consent, notwithstanding the existence of another statute requiring such consent. (PB 26-27)

Interior also has interpreted various statutes as alternative means of obtaining rights-of-way across Indian lands. In two unreported cases, *Coachella Valley Ice and Electric Co.* and *Southern Sierra Power Co.*, both discussed in *Icicle Canal Co.* (1916) 44 Int. Land Dec. 511, 512-13, Interior held that two Mission Indian reservations, the Morongo and Cabezon, were "reservations" within the meaning of the Acts of February 15, 1901 (43 U.S.C. 959) and March 4, 1911 (43 U.S.C. 961), and granted rights-of-way across both. Interior apparently viewed the two general right-of-way statutes as either superseding or being an alternative to the more specific MIRA section 8.²¹

Here, both Interior and the Commission have long interpreted MIRA section 8 as not being the exclusive method of obtaining

ities. (See argument heading IB 43) Instead Interior merely urges that MIRA is the more appropriate statute because "the primary purpose of Project No. 176 is to convey water, not to produce power." (IB 48) The Bands also emphasize that MIRA applies because "[t]he primary purpose of Project No. 176 is the diversion and conveyance of water. . . ." (BB 45) Their argument smacks of an attempt to argue that Project No. 176 is not a jurisdictional power project. They ignore the Ninth Circuit's affirmation of Commission jurisdiction. (PA 12-16)

²¹Interior also relied on the Act of February 15, 1901 in granting Mutual certain rights-of-way in its 1914 contract. (PB 24)

General acts can supersede earlier specific acts. See, e.g., *Apis v. United States* (1898 S.D. Cal.) 88 F. 931, 938 (A special Act permitting Apis to file a claim for the "La Jolla Rancho" held superseded by MIRA even though it did not specifically authorize the creation of the La Jolla Reservation.)

rights-of-way across the Bands' land.²² (PB 23-26)

The argument (BB 39-40, IB 50) that Petitioners must obtain rights-of-way under both the FPA and MIRA section 8 is illogical. The purposes of the two acts differ. Petitioners need a canal and other rights-of-way for hydropower development — a purpose expressly covered by the FPA but not covered by MIRA section 8. Interior has held that even where two right-of-way statutes apply on their face, an application cannot be made under both, but must be made under the act most consistent with the applicant's purposes. (*See H. W. O'Melveny* (1897) 24 Int. Land Dec. 560)²³

MIRA and the FPA provide separate procedures and conditions for obtaining rights-of-way across Mission Indian reservations for different purposes. Because Project No. 176 is a power project within the Commission's comprehensive licensing authority, FPA procedures govern (PA 30-32) and Indian consent is not required.

²²Interior attempts to blunt the force of this longstanding interpretation by arguing that MIRA section 8 was never considered. Interior is wrong.

During the sequence of events that led to the granting of the 1908 permit Interior first instructed Mutual's predecessor to apply under MIRA, but later informed it that it could apply under the Act of March 3, 1891, *supra*. (PB 23 n.36, 24 and 24 n.37) The 1914 contract as submitted by Mutual, was similar to the 1894 contract, which had been entered into pursuant to MIRA, and would have required Indian consent. (*See* NJA 1330-37) Interior deleted the Indian consent provision. (JA 20-21)

Any failure to mention MIRA in connection with the FPA is not surprising. The FPA gave the Commission exclusive authority to license the use of Indian lands for federal power projects (PB 32 n.44) and did not require Indian consent.

²³In discussing an application under both the Act of March 3, 1891, *supra*, and the Act of May 14, 1896 (43 U.S.C. section 957), Interior stated:

"The two acts . . . are so different in the character of estate or permission therein provided for, as well as in the uses to which the right-of-way may be devoted and the extent to such right of way, that no permission or grant can be sanctioned which is based upon the two acts. The permission granted must rest either upon one act or the other." (24 Int. Land Dec. at 560-61)

II.

INTERIOR'S CONDITIONS ARE NOT MANDATORY.

A. Section 4(e)'s Conditions Proviso Cannot Be Read in Isolation.

There is a tension between the FPA's goal of hydro-power development and the need to protect various reservations.²⁴ Section 4(e) requires the Commission to find that a project will not interfere or be inconsistent with the purposes of the reservation it is located "within." It also states that a license "shall be subject to and contain" conditions that the "Secretary" responsible for the reservation deems necessary for its protection. The tension cannot be resolved by blindly stating that this language must be applied literally.²⁵

Amici NWF describe the Commission's 4(e) "findings" as "a go/no-go decision on the project." (NWF B 9) They concede that Congress withheld veto power from the agencies, but argue that it allowed them to specify mitigation measures. (*Ibid.*) Petitioners agree that Congress allocated roles to both the Com-

²⁴The contentions that Congress' "overriding" (IB 24-25), "primary" (BB 16-18) and "paramount" (IB 23) purpose in enacting the FPA was to protect Indian and other reservations are wrong. Congress' overriding purpose was hydro-power development. See *Chemehuevi*, *supra*, 420 U.S. at 404-05; *Federal Power Comm'n. v. Union Electric Co.* (1965) 381 U.S. 90, 98-101; see also Pinchot, "The Long Struggle for Effective Federal Water Power Legislation," 14 Geo. Wash. L. Rev. 9 (1945). The protection of Indian (PB 14-15, remarks of Senators Nelson, Walsh and Meyers) and other reservations (PB 36, remarks of Lawson) was subordinate. (See also discussion, *supra*, n.7)

²⁵It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." (*United Steelworkers of America v. Weber* (1979) 443 U.S. 193, 201, quoting *Holy Trinity Church v. United States* (1892) 143 U.S. 457, 459.) See also, *Chemehuevi*, *supra*, 420 U.S. at 403 (Court criticized Indian reliance on literal language of section 4(e)); cf. "Words are not pebbles in alien juxtaposition." (*NLRB v. Federbush Co.* (1941 2d Cir.) 121 F.2d 954, 957).

mission and Interior.²⁶ What NWF, Interior and the Bands refuse to recognize is that if the conditions are mandatory, the Commission's role is destroyed.

Here, the Commission solicited, carefully considered, and adapted Interior's conditions.²⁷ (PA 143-55) It found that the project *as conditioned by it* would not be inconsistent or interfere with the Bands' reservations. (PA 174, 176) Interior disagreed with the Commission's inconsistency/non-interference findings (PA 137) and in effect, insisted that its conditions were necessary to such a finding. To make Interior's conditions mandatory would place the inconsistency/non-interference decision with Interior, and usurp the Commission's section 4(e) role. (See APPA B 10 n.17) Moreover, if the Commission were forced to accept Interior's conditions — conditions designed to make the Projects' operation resemble that under the non-power license or recapture alternative (see JA 300) — its section 10(a) role also would be usurped. (See PB 41-42) This would return hydro-power to its

²⁶The balance struck by section 4(e) is similar to that in section 10(e). (See, *Montana Power Co. v. Federal Power Comm'n* (1972 D.C. Cir.) 459 F.2d 863, 874, cert. denied (1972) 408 U.S. 930; EEI B 14-15)

Interior (IB 20 n.23) and NWF (NWF B 11-14) make much of the fact that under section 30(c), the Commission has indicated that in granting exemptions it will not review conditions imposed by Wildlife Agencies. (See, e.g., *Swanson Mining Corp.* (1982) 20 FERC ¶ 61,229). However, that does not mean that the Commission abrogates its responsibilities to determine if the condition is environmentally related. (*Ibid.*) Also, once a project is exempt it no longer is under Commission jurisdiction and any conflicts between the Commission and the agency are minimized. Moreover, if the conditions imposed on the exemption are too burdensome, the applicant may always apply for a license.

Interior's discussion (IB 19-20) of sections 4(e), 11(a) and 18 is unavailing. These sections merely permit the Commission to draw on the technical expertise of other agencies.

²⁷Interior (IB 32-36) cannot significantly distinguish the many Commission cases (PB 37-38; EEI B 12 n.12; FERC B 33) in which the Commission rejected or modified various secretarial conditions.

pre-FPA days when power development was subject to the discretion of the various secretaries.²⁸

This case presents a worst-case scenario. If the Commission can be forced to accept Interior's conditions — conditions designed to destroy the project (JA 300) — it will have to accept every condition prepared by any secretary in the future, no matter how irrational or parochial. The clock will be turned back to the pre-FPA days when the nation's water power development foundered. (See PB 32 n.43)

B. An Interior Veto Is Unworkable.

The mandatory inclusion of Interior's conditions creates a dual authority — the Commission and Interior. Such dual authorities are "unworkable". (*First Iowa Hydroelectric Coop. v. Federal Power Comm'n* (1946) 328 U.S. 152, 168).

It makes judicial review unfeasible. Respondents (IB 38; BB 26) argue that secretarial conditions would be reviewable under section 313(b). Section 313(b)'s substantial evidence test, however, necessitates an evidentiary hearing. (See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe* (1971) 401 U.S. 402, 414.) Under the FPA only the Commission can conduct evidentiary hearings. Interior's conditions were arrived at in strategy sessions (NJA 1639-40) with the Bands and submitted in advocate form with argumentative "reasons" for their imposition. (JA 49-61) Interior conducted no evidentiary hearings, made no findings of fact, and created no record on which appellate review can be based. In fact, Respondents argued that imposition of the conditions was within Interior's sole discretion (JA 40) and did not

²⁸In quoting O.C. Merrill (IB 25), Interior carefully omits his statement: "A coordinate administration of the water power activities of the three Departments . . . will give power users *one authority* instead of three with which to deal." (JA 371)

require separate witnesses or testimony.²⁹ (JA 62-63) To contend that nevertheless Interior's conditions should be subject to the "substantial evidence test" (BB 26; IB 38) or an "arbitrary and capricious" standard (NWF B 18) verges on "Newspeak." (See G. Orwell, 1984 (1949 Harcourt Brace & Co. Ed.) 303-314.)

The practical problems of holding that Interior's conditions are mandatory are legion.³⁰ (APPA B 16-23) The more one contemplates it, the more unworkable the mandatory inclusion of Interior's conditions become.³¹

C. An Interior Veto Would Be Inappropriate in This Case.

1. Making Interior's Conditions Mandatory Would Violate Petitioners' Right to Due Process.

Interior wants to be the initial arbiter with respect to whether its own conditions are reasonable; however, here Interior was a competing applicant recommending federal takeover (PA 70-71),

²⁹Interior's actions belie its statement: "conditions cannot be imposed arbitrarily [and] must be reasonable and supported by the evidence on the record." (IB 37)

Contrary to its contention (IB 37 n.39), the Commission, by finding that the license *as conditioned by it* would not interfere or be inconsistent with the Bands' reservations (PA 174, 176), necessarily found that the rejected conditions were *not* reasonably necessary to protect the reservations.

Although Petitioners opposed Interior's conditions on the grounds that they were beyond the Commission's jurisdiction, they were never accorded an evidentiary hearing with respect to the formulation of and need to impose them. The colloquy with Interior officials (JA 105-201) where no cross-examination was permitted (*see* JA 106) did not take the place of an evidentiary hearing. Moreover, Section 313(b) does not prescribe any standard for review of the Secretary's conditions. It is obvious that Congress envisioned that the Commission would decide all matters and review would be had from its decision.

³⁰Does it make any sense to require the Commission to include conditions that are unlawful (APPA B 17-18, PA 151); beyond its jurisdiction (PA 148); impossible (PA 149); incompatible with its findings of fact (APPA B 19-20); or superseded by or in conflict with its own conditions? (PA 146; PERC B 19 n.25; PA 143)

³¹As Justice Jackson said, "I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'" (*Securities & Exchange Comm'n v. Chenery Corp.* (1947) 332 U.S. 194, 214 (dissenting opinion))

and construed its trust responsibility to the Bands so broadly as to preclude it from any reasoned, objective decision on the reasonableness of or need for the conditions it proposed.³²

The parties before the Commission "are entitled to . . . a full hearing in conformity with the fundamental concepts of fairness." (*Shell Oil Co. v. Federal Power Comm'n* (1964 3d Cir.) 334 F.2d 1002, 1012) "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." (*Wong Yang Sung*

³²Interior lost all pretense of fairness when Mr. Chambers, its spokesman, stated:

"[W]hatever happens in the [District Court], we have made an administrative determination by the Department of Interior as to what is necessary under the terms of the statute to adequately protect and utilize these reservations." (JA 176)

Later Chambers admitted:

"[Interior's] trust responsibility to Indians . . . may preclude the kind of fairness, the kind of balancing of interests that normally goes on in the political process." (JA 182)

When the ALJ suggested an informal conference with Interior over the proposed conditions (JA 200), Chambers replied:

"I think . . . bedrock legal questions . . . separate us. . . . [T]he department is not going to . . . recede from the basic trust responsibility we feel we have here, and it may ultimately be that our conception of that responsibility is that it does require more water than they can surrender and economically operate the project." (*Ibid.*)

Thus, Interior ignored the teaching of one of its own texts. On page 2 of the Introduction to *Federal Indian Law* (1958 Dept. of Int.) are the following words:

"[N]othing could be more destructive of good will or more inimical to the advancement of which Indians are known to be capable than an immoderate accentuation of the idea that the United States Government is under a special obligation to all citizens who have Indian blood as a distinct class because of real or fancied injustices to their ancestors. In this connection it should be noted that there is a tendency to emphasize the obligations of the Government of the United States as trustee of the Indians and their rights. There is a related tendency in so doing to minimize the fact that it is also trustee of the rights of all the citizens and nationals of the United States."

v. McGrath (1949) 339 U.S. 33, 50) To give Interior the initial determination respecting the need for and reasonableness of its proposed conditions would violate fundamental notions of fairness. This very concern prompted the ALJ to respond to Interior's insistence that its conditions be imposed exactly as propounded:

"[T]he judge of this case, the decider of this case, is one of the litigants, the Secretary How can the parties on both sides feel they are fairly treated when it turns out that the judge is the opposition party? That part worries me, and I can't quite see the answer." (NJA 1638)

The answer is to give the Commission the initial determination as to which of Interior's conditions are reasonably necessary to protect the Bands' reservations. (PA 41, Judge Anderson) The Commission's decision is more properly entitled to a presumption of validity on judicial review than a decision by an agency who is not only an adversary party to the proceedings, but whose trust responsibilities by its own admission preclude it from being fair and impartial.³³

2. Interior's Conditions Are Not Mandatory on Relicensing.

The Bands note, "[t]his case arises under the relicensing³⁴ provisions of the . . . FPA" (BB 2) but argue that section 4(e) nevertheless applies. (BB 19 n.10) Their argument begs the ques-

³³Contrary to NWF's contention (NWF B 19), Petitioners do not desire "two bites at the apple"; Petitioners merely desire a fair first bite at the apple along with Respondents before a neutral tribunal — the Commission. (Cf. *Montana Power Co. v. Federal Power Comm'n* (1970 D.C. Cir.) 445 F.2d 739, 754, *cert. denied* (1971) 400 U.S. 1013 (The Commission, unlike Interior, has "broad stewardship over various aspects of the public interest . . . [including] the function and capacity for fair treatment of individual parties before it, whether licensees or Indian landlords."))

³⁴Petitioners agree with the Bands that this is a relicensing. They respectfully disagree with the Commission who stated that it was "partly an initial licensing . . . partly a relicensing." (PB 43 n.51) Contrary to Amici (NWF B 4 n.6) the scope of the Project has not substantially changed. The canal was placed in operation in 1895 (PA 51), the powerhouses were completed in 1915-16 (PA 53), and Henshaw Dam in 1922. (PA 58) Prior to issuing the license the Commission knew that the Project would be used to convey Henshaw water. (PA 59) The last major modifications occurred in the late 1920's and were covered by license amendments. (PA 61)

tion. Regardless of whether section 4(e) is "an existing law," the question remains as to whether it is an *applicable* existing law. Section 15(a)'s legislative history³⁵ and the Commission's interpretation (see *Pacific Gas & Electric Co.* (1975) 53 FPC 523, 526) indicate that it is not. (See PB 42-44)

Notwithstanding contrary *dicta* (EEL B 17 n.18) in *Lac Courte Oreilles Band v. Federal Power Comm'n* (1975 D.C. Cir.) 510 F.2d 198, 210-11, Congress could not have intended that a useful project originally found not to interfere with a reservation, could be destroyed on relicensing by the forced imposition of new unworkable secretarial conditions.

Interior's assertion that Petitioners cannot raise the applicability of section 4(e) under section 15(a), because they did not petition for rehearing on that issue (IB 21 n.24), is wrong. Section 313(b) allows an issue to be raised before a Court, although not raised below, where "there is a reasonable ground for failure to do so." Here, Petitioners reasonably believed they were not "aggrieved" and thus neither required nor entitled to seek rehearing on that issue.³⁶ (§313(a)). That issue is not moot in this Court.

³⁵See, e.g., Merrill's October 1917 Memorandum on Water Power Legislation (JA 369) noting that when a license is renewed, it should be "with such conditions as the public interests may then require." No mention is made of the section 4(e) reservation proviso. Furthermore, the language of the last proviso of section 15(a) indicates that Congress intended that new licenses be issued on "reasonable terms".

³⁶The Commission's express refusal to decide whether section 4(e) applied on relicensing (PA 137 n.136) made it unclear whether Petitioners were an aggrieved party with respect to that issue. (See *Southern Union Gas Co. v. Federal Power Comm'n* (1976 D.C. Cir.) 536 F.2d 440, 442 n.4) Although the Commission imposed certain conditions, Petitioners reasonably believed that they were imposed under sections 10(a) and (g) (see PA 143; 173-75; 176) which apply on relicensing, as opposed to section 4(e) which does not. (See *Kansas Cities v. Federal Energy Regulatory Comm'n* (1983 D.C. Cir.) 723 F.2d 82, 86) Moreover, the conditions which Interior believes should have been made mandatory under section 4(e) were not imposed by the Commission. It was not until the Ninth Circuit held such conditions mandatory under section 4(e) that Petitioners were adversely affected by the Commission's holding. (*Ibid.*)

3. Interior's Conditions Are Not Mandatory for Minor Projects.

Project No. 176 is a minor project (PA 69 n.49) and the Commission has the power under section 10(i) to waive Interior's 4(e) conditions. (PA 137) Interior's statement that "the Commission expressly refused to waive the Section 4(e) requirements in this case" (IB 23)³⁷ misses the point. The very fact that the Commission had the power to waive Interior's conditions, regardless of whether it chose to do so, makes it absurd for Respondents to contend that the conditions are mandatory in this case.

III.

INDIAN WATER RIGHTS ARE NOT A "RESERVATION" FOR SECTION 4(e) PURPOSES.³⁸

Respondents strain mightily (IB 39-40; BB 28-29), but cannot explain away the FPA's express language which shows that Congress did not intend "Indian water rights" to be a "reservation" for section 4(e) purposes. They ignore Congress' uses of geographical limiters, *e.g.*, "upon" and "within" in section 4(e), to confine the Commission's licensing authority. (PB 44-45)³⁹ (*See, e.g., Reiter v. Sonotone* (1979) 442 U.S. 330, 339 (In

³⁷The Commission's refusal to invoke section 10(i) is understandable in light of its longstanding interpretation of 4(e) as not mandating the inclusion of all secretarial conditions. When the Commission exercised its discretion not to invoke 10(i)'s waiver, it also exercised its discretion to reject some of Interior's conditions as unreasonable. Whether reviewed as a rejection under section 4(e) or a constructive waiver under section 10(i) the result is the same.

³⁸Interior states that Judge Anderson agreed that section 4(e) applies to downstream reservation water rights. (IB 39 n.41) In fact, Judge Anderson concluded that "FERC properly interpreted and applied section 4(e) and that *all* its findings in that regard are supported by substantial evidence." (PA 41)

³⁹*See also*, section 23(b) referring to "works . . . upon any part of the . . . reservations" By noting that in a later portion of section 23(b) Congress also used the words "if no . . . reservations are affected" (IB 40; BB 28), Respondents merely show that Congress knew how to use such words. Congress *did not* use those words in section 4(e).

construing a statute, Courts should, if possible, give effect to every word Congress used.))

That "Indian water rights" might constitute "an interest in land" or "a reservation" under other circumstances (PA 26) is irrelevant. (*Federal Power Comm'n v. Tuscarora Indian Nation* (1960) 362 U.S. 99, 111) For purposes of section 4(e), Congress intended to confine the term "reservations" to lands owned by the United States or in which it owns a property interest. (*Id.* at 114)

Even if "Indian water rights" were within the literal terms of section 4(e), that would not end the inquiry. (See, *Chemehuevi Tribe of Indians, supra*, 420 U.S. 395 (Court held thermal electric power generating plants not subject to licensing jurisdiction even though they literally qualified under section 4(e)) When 4(e) is read together with the rest of the Act, as it must be (*Id.* at 403), it is clear that "water rights" were treated separately (see §27) and the Commission was denied jurisdiction over such rights. (See PB 39, 40; FERC B 31 n.36, 37 n.41; APPA B 26-29; see also, EEI B 21) Nor is there any suggestion in the legislative history that "Indian water rights" were intended to be a "reservation" for section 4(e) purposes. This analysis is reinforced by the Commission's consistent administrative interpretations. (PB 45)

In any event, there is no reason to strain the meaning of the FPA to include Indian water rights. They will be fully protected by the District Court. (See *Winters v. United States* (1908) 207 U.S. 564).⁴⁰

⁴⁰After the District Court determines the water rights, it can enforce them. However, as recently as August 1980, it denied motions brought by Respondents to require Petitioners to release additional water from Henshaw. It found: "The United States and the Indian Bands have failed to establish that they have a present, actual need for additional releases of water." (Copies of the District Court's August 1980 Order, Findings and Conclusions are lodged with the Clerk of the Court.)

CONCLUSION.

When Congress passed the FPA, its overriding purpose was to foster hydroelectric development. If the Ninth Circuit's Decision is not reversed, not only will Petitioners be harmed, but this Congressional intent will be frustrated.

Dated: March 16, 1984.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1983

ESCONDIDO MUTUAL WATER COMPANY, ET AL.,
PETITIONERS

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA, AND
PALA BANDS OF MISSION INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**REPLY BRIEF FOR THE
FEDERAL ENERGY REGULATORY COMMISSION**

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TABLE OF CONTENTS

	Page
I. The Secretary's conditioning authority	2
II. The reach of the Section 4(e) proviso	12
III. The issue whether Section 4(e) is applica- ble to relicensing is not properly pre- sented in this case	15
Conclusion	17

TABLE OF AUTHORITIES

Cases:

<i>City of Tacoma v. Taxpayers of Tacoma</i> , 357 U.S. 320	10
<i>Chapman v. El Paso Natural Gas Co.</i> , 204 F.2d 46	6
<i>FPC v. Tuscarora Indian Nation</i> , 362 U.S. 99	12, 13, 14, 15
<i>Grand River Dam Authority v. FPC</i> , 246 F.2d 453	15
<i>Leiter Minerals, Inc. v. United States</i> , 352 U.S. 220	15
<i>Montana Power Co.</i> , 56 F.P.C. 2008	16
<i>Montana Power Co. v. FPC</i> , 459 F.2d 863, cert. denied, 408 U.S. 930	4
<i>Northern States Power Co.</i> , 13 F.E.R.C. (CCH) ¶ 61,055	16
<i>Northern States Power Co.</i> , 50 F.P.C. 753, aff'd sub nom. <i>Lac Courte Oreilles Band of Indians v. FPC</i> , 510 F.2d 198	16
<i>Pacific Gas & Electric Co.</i> : 25 F.E.R.C. (CCH) ¶ 61,010	16
25 F.E.R.C. (CCH) ¶ 61,344	16
<i>Pacific Gas & Electric Co.</i> , 53 F.P.C. 523	16

II

Cases—Continued:

	Page
<i>Pigeon River Lumber Co.</i> , 1 F.P.C. 206 ...	6
<i>Rincon Band of Mission Indians v. Escondido Mutual Water Co.</i> , Nos. 69-217-S, 72-276-S and 72-271-S (S.D. Cal.):	
Jan. 10, 1980	15
Dec. 10, 1980	15
<i>Sierra Pacific Power Co.</i> , 19 F.E.R.C. (CCH) ¶ 61,807	8
<i>Southern California Edison Co.</i> , 23 F.E.R.C. (CCH) ¶ 61,240	16
<i>Southern Pacific Land Co.</i> , 19 F.E.R.C. (CCH) ¶ 61,297	8
<i>Swanson Mining Corp.</i> , 22 F.E.R.C. (CCH) ¶ 61,184	8
<i>Swanson Mining Corp.</i> , 20 F.E.R.C. (CCH) ¶ 61,229	8
<i>United States v. Wittek</i> , 337 U.S. 346	15

Statutes:

<i>Energy Security Act</i> , Pub. L. No. 96-294, 94 Stat. 611 <i>et seq.</i> :	
§ 408(b), 94 Stat. 718	7
§ 408(c), 94 Stat. 718	7
<i>Federal Power Act</i> , 16 U.S.C. 791a <i>et seq.</i> :	
§ 3(2), 16 U.S.C. 796(2)	12, 13
§ 4(e), 16 U.S.C. 797(e)	<i>passim</i>
§ 10(e), 16 U.S.C. 803(e)	4, 14
§ 15, 16 U.S.C. 808	15, 16
§ 15(a), 16 U.S.C. 808(a)	15, 16
§ 26, 16 U.S.C. 820	11
§ 30, 16 U.S.C. 823a	7, 9

III

Statutes—Continued:	Page
§ 30(c), 16 U.S.C. 823a(c)	7, 8
§ 30(c)(1), 16 U.S.C. 823a(c)(1)	7
§ 30(d), 16 U.S.C. 823a(d)	8
§ 313, 16 U.S.C. 825l	10
§ 313(a), 16 U.S.C. 825l(a)	17
§ 313(b), 16 U.S.C. 825l(b)	12
§ 314, 16 U.S.C. 825m	11
Fish and Wildlife Coordination Act, 16 U.S.C. 661 <i>et seq.</i>	9
Mineral Leasing Act for Acquired Lands, 30 U.S.C. (& Supp. V) 352	5-6
Mission Indian Relief Act of 1891, ch. 65, § 8, 26 Stat. 714	1, 14, 15
Public Utility Regulatory Policies Act of 1978, Tit. IV, 16 U.S.C. 2701 <i>et seq.</i> :	
§ 405, 16 U.S.C. 2705	7
§ 405(d), 16 U.S.C. 2705(d)	8
§ 408, 16 U.S.C. 2708	7
§ 408(b), 16 U.S.C. 2708(b)	8
Miscellaneous:	
56 Cong. Rec. 9668-9669 (1918)	5
59 Cong. Rec. (1920):	
p. 1564	5
p. 1565	5
72 Cong. Rec. 10337 (1930)	3
H.R. Rep. 95-543, 95th Cong., 2d Sess. (1977)	9

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2056

**ESCONDIDO MUTUAL WATER COMPANY, ET AL.,
PETITIONERS**

v.

**LA JOLLA, RINCON, SAN PASQUAL, PAUMA, AND
PALA BANDS OF MISSION INDIANS, ET AL.**

***ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT***

**REPLY BRIEF FOR THE
FEDERAL ENERGY REGULATORY COMMISSION**

In our initial brief we argued that the court of appeals misconstrued Section 4(e) of the Federal Power Act (Power Act), 16 U.S.C. 797(e), and Section 8 of the Mission Indian Relief Act of 1891 (MIRA), ch. 65, 26 Stat. 714, when it held that those provisions require the Federal Energy Regulatory Commission to accept, without modification, any and all conditions the Secretary of Interior may submit for inclusion in a Commission hydroelectric license and to obtain the consent of the Mission Indian Bands to issue the license. We urged further that the court of appeals compounded these er-

rors by extending the Section 4(e) requirements to reservations not physically occupied by the project. None of the contentions in the briefs of respondents or the amici who support them, the National Wildlife Federation *et al.* (Wildlife Amici), weakens the validity of our submissions.

I. THE SECRETARY'S CONDITIONING AUTHORITY

A. The Secretary responds to our contention that his Section 4(e) conditioning authority is subject to a reasonableness standard applied by the Commission,¹ by disregarding the close relationship between the Commission's broad duty under Section 4(e) to make the "interference/inconsistency" finding and the Secretary's more narrowly focused conditioning authority. It is apparently the Secretary's view that the obligations imposed by the two clauses of the Section 4(e) proviso are so separate and independent that the exercise of authority under one has "no bearing" upon the exercise of authority under the other and that therefore the Secretary may exercise his conditioning authority completely unfettered by the Commission. See Interior Br. 22, 31-32 n.35.²

This is flawed analysis. As we explained in our initial brief (at 17-26) the close relationship between the two grants of authority in the Section 4(e) proviso is mani-

¹ In the view of the Commission, the Secretary's conditions must be reasonably related to protection of a reservation from undue disruption by the physical aspects of the construction and operation of the project (FERC Br. 33).

² The Secretary's view is not shared by the Wildlife Amici. Thus, the Wildlife Amici recognize that the Secretary may use his conditioning authority "not to halt a project but to specify mitigation measures" (Wildlife Br. 9).

fested by the language of the proviso and supported by traditional canons of statutory construction. Clearly the exercise of one grant of authority has a direct impact on the exercise of the other; and, when in conflict, it is wholly reasonable that the broader authority of the Commission should prevail.

B.1. The Secretary contends that the legislative history of the Power Act supports the claim that Section 4(e) grants a Cabinet Secretary a "veto" over the issuance of a license by the Commission and "leaves no room" for the Commission to reject or modify the conditions he proposes (Interior Br. 22, 30). For example, the Secretary seizes upon a statement made in 1930 by the Chief of Engineers of the War Department characterizing the authority of the Secretary of War under Section 4(e) as a "veto power" (Interior Br. 30) and a statement (allegedly made by James Lawson, the Commission's Chief Legal Counsel) in an internal Commission memorandum to the Commission Executive Officer stating that under Section 4(e) "[t]he function of the Secretary of Interior * * * is * * * to prescribe conditions to be inserted in the license for the protection and utilization of the reservation" (Interior Br. 33).

The statement of the Chief of Engineers of the War Department, however, obviously refers to the part of Section 4(e) dealing with projects on navigable waters, not "reservations" (72 Cong. Rec. 10337 (1930)). That part of Section 4(e) does not refer to "conditions"; rather it specifically requires the "approval" of the Secretary of War and Chief of Engineers of the "plans" for dams and structures affecting navigation.³ Nor do we

³ This difference between the reservation and navigable rivers clauses of Section 4(e) shows that Congress could have re-

deny that, as stated in the internal Commission memorandum on which respondents rely, the Secretary has authority "to prescribe conditions for inclusion" in a Commission license; instead our position is that the Secretary lacks authority *to force* the Commission to include in its license, without modification, any and all conditions he proposes even if they are patently unreasonable. Indeed, as noted in our initial brief (at 26, citation omitted), James Lawson, the alleged author of that memorandum, explained to Congress one year later that "[t]he Commission now has power to overrule the head of the department as to the consistency of a license with the purpose of any reservation." ⁴

quired direct "approval" by a Cabinet Secretary of a project on a reservation as a prerequisite to issuing a license, rather than merely conferring conditioning authority. In any event, the District of Columbia Circuit has held that where the Power Act requires the "approval" by the Secretary of Interior for "annual charges" set by the Commission under Section 10(e), 16 U.S.C. 803(e), the Secretary cannot withhold his "approval" unless the charges are "unreasonable." *Montana Power Co. v. FPC*, 459 F.2d 863, 873-874 (D.C. Cir.), cert. denied, 408 U.S. 930 (1972). See FERC Br. 42-43. Thus, even where the Power Act specifies that "approval" must be obtained from another source, that authority is not the equivalent to "veto" authority. Surely a lesser conditioning power, as here, may not be elevated into an unyielding directive.

⁴ The Secretary (Interior Br. 31-32 n.35) contends this 1930 remark relates only to the inconsistency/interference clause in the Section 4(e) proviso, not the conditioning clause of the proviso. But Lawson's statement can hardly be read in such a grudging manner. Since a Cabinet Secretary does not make the interference/inconsistency finding, Lawson could only be referring to the fact that the Commission's authority to make the inconsistency/interference finding modifies the authority of a Cabinet Secretary to impose conditions under Section 4(e).

Likewise, a statement by Senator Walsh (made in response to an attempt to subject the bill to an amendment requiring Indian consent for the issuance of a license) that " 'the Secretary of Interior in the case of an Indian reservation must agree that the license shall be issued' " (Interior Br. 27, quoting 59 Cong. Rec. 1564 (1920)), does not support Interior's far broader claim that Section 4(e) authorizes the Secretary to "veto" a license. The basic focus of the Senator's statement was to prevent the inclusion of Indian veto authority within the Act. See also 59 Cong. Rec. 1565 (1920) (statement of Sen. Myers).

Moreover, the Secretary's interpretation of Senator Walsh's statement cannot be reconciled with the Senator's earlier statement that " 'under the authority given this commission in this bill the Secretary of Agriculture, as the executive head of that department, can not block a project upon which the other two Commissioners have agreed' " and that " '[t]he Department of War and the Department of the Interior can adopt a project even if the Secretary of Agriculture opposes it.' " See FERC Br. 24-25 n.29 (quoting 56 Cong. Rec. 9668-9669 (1918) (remarks of Sen. Walsh)). Indeed, since Senator Raker, the sponsor of the Wilson Administration's bill that became the Federal Water Power Act, specifically endorsed this earlier statement of Senator Walsh (*ibid.*), it is clear that the bill was not designed to confer authority on any of the three Cabinet officers "to block" the issuance of a license.⁵ Moreover, as noted in

⁵ Undenially, there are occasions where Congress has subjected administrative action to "the consent" of another agency or executive department. Thus the Wildlife Amiel cite a 1947 provision in the Mineral Leasing Act for Acquired Lands, 30

our initial brief (at 26), statements by a variety of participants at the 1930 hearings at which the Power Act was amended, including a statement of the Secretary of Interior, confirm that the conditioning authority of the Cabinet Secretaries under Section 4(e) is not equivalent to "veto" authority.

2. To be sure, the Commission has long recognized that conditions proposed by a Secretary under Section 4(e) are entitled to great weight by the Commission (see FERC Br. 33-34). We do not retreat from that position here. We say only that the Secretary may not require the Commission to adopt "without modification" conditions he proposes when, in the Commission's expert view, the proposed conditions are not reasonably related to protection of a reservation from undue disruption by the physical aspects of the construction and operation of the project. See FERC Br. 33-34; see also *Chapman v. El Paso Natural Gas Co.*, 204 F.2d 46 (D.C. Cir. 1953).⁶

U.S.C. (& Supp. V) 352, to support their position here. In point of fact, however, that provision, like the navigable waters proviso relied upon by amici, authorizes a head of a department to subject a mineral lease on lands under his jurisdiction to conditions but *additionally* requires his "consent" for the project. That provision therefore supports our view that where an Act merely allows the head of a department to condition a license, his authority is not tantamount to "veto" authority.

* The Secretary (see Interior Br. 33-34) misinterprets Commission precedent in arguing that the Commission's interpretation of Section 4(e) is not deeply rooted on the ground that the Commission's statement in *Pigeon River Lumber Co.*, 1 F.P.C. 206 (1985) refers to the inconsistency/interference finding, not the Secretary's conditioning authority. To the contrary, in our view *Pigeon River* wholly supports the Commission claim that its finding authority controls the Secretary's conditioning authority. See 1 F.P.C. at 209. Nor is Interior's claim that the

3. It deserves noting with regard to the legislative history that neither the Secretary nor the Bands responds to that aspect of the history detailed in our initial brief (at 28-30, 33-34) which clearly shows that the 1920 Act carried forward the approach adopted in the earlier right-of-way statutes regarding use of federal lands for hydroelectric facilities. The retention of these traditional concepts strongly supports our submission that Congress in granting a Cabinet Secretary conditioning authority in the licensing context also meant to preserve the already well-established principle that the authority to impose conditions on a right-of-way only permits the imposition of those reasonable terms and conditions needed to minimize physical interference with the use of the servient lands. See FERC Br. 29-30 n.34, 34-36 & n.40.

C. Section 30 of the Power Act, 16 U.S.C. 823a, which authorizes the Commission to "exempt" certain small projects from the licensing and other requirements of the Federal Power Act, provides that "the Commission shall * * * include in any such exemption—* * * such terms and conditions as the United States Fish and Wildlife Service and the State [fish and wildlife] agency each determine are appropriate" to preserve fish and wildlife resources (§ 30(c) and (1), 16 U.S.C. 823a(c) and (1).⁷ The Wildlife Amici contend

Secretary's conditions were not rejected prior to 1975 (Interior Br. 34) persuasive; that simply shows that until 1975 Interior did not make any claim to the extravagant conditioning authority it has asserted here.

⁷ In addition, Section 408(b) and (c) of the Energy Security Act, Pub. L. No. 96-294, 94 Stat. 718, amended Sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. 2705 and 2708, to allow the Commission

(Wildlife Br. 11-14) that the Commission's interpretation of Section 4(e) in this case is wholly at odds with its construction of Section 30(c), since the Commission has held that under Section 30(c) it "is not within * * * [its] authority to review by evidentiary hearings or otherwise conditions properly imposed by fish and wildlife agencies" for inclusion in an exemption. *Swanson Mining Corp.*, 22 F.E.R.C. (CCH) ¶ 61,184, at 61,319 (1983); accord, *Swanson Mining Corp.*, 20 F.E.R.C. (CCH) ¶ 61,229 (1982); *Southern Pacific Land Co.*, 19 F.E.R.C. (CCH) ¶ 61,297 (1982); *Sierra Pacific Power Co.*, 19 F.E.R.C. (CCH) ¶ 61,307 (1982).⁸ However, a comparison of Section 4(e) with Section 30(c) makes clear that the Commission acts properly in adopting a different approach to each of these two statutory provisions.

As the Wildlife Amici concede, the first clause of the Section 4(e) proviso vests the Commission with the authority to make "a go/no-go decision on the project" (Wildlife Br. 9) and the Secretary's authority is limited

also to exempt small hydroelectric projects under five megawatts built in connection with existing dams from licensing requirements under Section 30(c) and (d) of the Power Act. See Sections 405(d) and 408(b) of PURPA, 16 U.S.C. 2705(d) and 2708(b).

⁸ As the Wildlife Amici recognize (Wildlife Br. 13 n.22), in the *Swanson* case, the Commission nevertheless refused to impose a condition proposed by a state fish and wildlife agency that was not related to the project's environmental impact. In *Sierra Pacific Power Co.*, 19 F.E.R.C. (CCH) ¶ 61,307, at 61,600-61,601 (1982), the Commission also refused to include a condition in an exemption proposed by the Fish and Wildlife Service that would have required the applicant to change its position in court litigation. In the view of the Commission, such a condition was "inappropriate."

under the second clause of the Section 4(e) proviso to conditioning the license with "mitigation measures" (Wildlife Br. 9, 11). In marked contrast, Section 30 does not allocate any broad responsibility to the Commission to enter a finding that an exemption is compatible with the protection of fish and wildlife or with the terms of the Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.* In fact, the legislative history of Section 30 specifically states that an exception "may not be granted" by the Commission if either the federal or state fish and wildlife agency "finds" that the project is not in accordance with the Fish and Wildlife Coordination Act and, *in addition*, that the Commission shall require in any exemption it issues the conditions proposed by the appropriate fish and wildlife agencies. See H.R. Rep. 95-543, 95th Cong., 2d. Sess. 50 (1977). In short, under Section 30 both the finding and conditioning authority, as it relates to fish and wildlife, are entrusted to the state and federal fish and wildlife agencies.

Section 30 was thus specifically designed by Congress to expedite authorization for certain small hydroelectric projects by taking them outside the normal procedures required under the Power Act. Unlike its Section 4(e) authority, the Commission's processing of an exemption application under Section 30 does not entail identifying and balancing all aspects of the public interest in the context of a comprehensive development standard. Rather, for the category of projects which qualify for exemption, Congress has already made the key public interest judgments and allocated both the finding and conditioning responsibilities for protection of fish and wildlife to the state and federal fish and wildlife agencies.

D. Both Interior (Br. 14, 37-38) and Wildlife Amici (Br. 18-19) agree that the Secretary's conditions must be reasonable; they contend, however, that it is the court of appeals, not the Commission, which is empowered to make that reasonableness determination in the first instance. As Judge Anderson well stated in dissent (Pet. App. 41):

I agree conditions imposed by the Secretary are mandatory on FERC to the extent they are reasonable; the crucial issue is which forum—the Secretary of Interior, FERC, or the reviewing court—is to decide reasonableness.

I would place the initial reasonableness decision on FERC, for it is, after all, the forum in which the initial fact-finding function is vested.

Judge Anderson's approach is sustained by governing precedent. As this Court held in its landmark jurisdictional decision in *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), Section 313 of the Federal Power Act, 16 U.S.C. 825l, provides the exclusive means for judicial review of Commission orders. It allows only "aggrieved parties" in the administrative proceedings before the Commission to challenge Commission orders on appeal and requires such parties to raise any error in a Commission order to the Commission on rehearing to preserve the issue on appeal. 357 U.S. at 336. Section 313 simply does not provide room for testing the validity of Section 4(e) conditions proposed by a Cabinet Secretary in the first instance on appeal, without the benefit of a record developed before the Commission and a Commission decision expressing its view on the legitimacy of the proposed conditions.

Nor can the Secretary fairly brush aside traditional statutory review procedures, as "insubstantial" (Interior Br. 38), for that argument ignores the express review provisions of the Act and is ultimately impracticable. It thus is not hard to see where that proposed scheme would lead. Viewed in terms of this case, it would, for example, compel the Commission to include, without question, the condition proposed by Interior (an interested party in the litigation before the Commission⁹) that the Bands be granted the "reserved and other rights" to the waters of the San Luis Rey River.¹⁰ Moreover, the Commission would be required to defend the decision to adopt that condition and then to enforce that condition under Sections 26 and 314 of the Power Act, 16 U.S.C. 820 and 825m, irrespective that

⁹ As the administrative law judge pointed out, Interior itself recognized in the joint brief it filed with the Bands in the administrative proceedings that the "net effect" of its proposed conditions would be to "resemble the operations under the [Bands' proposed] nonpower license or [Interior's] recapture alternative, for that is the only way to assure the adequate protection and utilization of the reservation." 6 F.E.R.C. (CCH) ¶ 63,008, at 65,075 (1979).

¹⁰ The Secretary to the contrary notwithstanding (Interior Br. 37), the Commission explained in its orders why Interior's conditions were unjustified. For example, it stated in regard to Interior's water-rights condition (Pet. App. 148 (footnote omitted)):

Condition 4 is rejected in its entirety because it represents an asserted acknowledgement and quantification of the Bands' claimed water rights under the Winters doctrine and, as indicated, the Bands and Interior expressly "acknowledge that the Commission is without jurisdiction to adjudicate the merits of the existing water rights controversy between the Bands and Mutual and Vista." Condition 4 would therefore require the Commission to do indirectly what they acknowledge cannot be done directly.

the Commission undeniably lacks jurisdiction to resolve water-rights claims and that such claims are now pending in the United States District Court for the Southern District of California and the Court of Claims.¹¹ Surely, Congress could not have intended such a bizarre statutory review procedure.

II. THE REACH OF THE SECTION 4(e) PROVISIO

The court below held that the water rights of downstream reservations, even though not occupied or traversed by this project, are nonetheless subject to the Section 4(e) provision on the ground that water rights are reservations (Pet. App. 25-26). This conclusion rests on flawed logic, finds no support in the statute, and is wholly inconsistent with this Court's decision in *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) construing the word "reservation" as it is used in the Power Act.

As we pointed out in our initial brief (at 37, quoting 16 U.S.C. 796(2) (emphasis added)) the Power Act specifically defines a reservation "as 'tribal lands embraced within Indian reservations' " and more generally as "lands and interests in lands owned by the United States." There is not the slightest suggestion in the

¹¹ Section 313(b) only allows an "aggrieved party" to challenge Commission orders; the role of the Commission in all appeals is to defend its orders. It is difficult to envision how the Commission could nonetheless object to the license on appeal as respondents assert. Moreover, the Secretary presumes too much in stating that the "disappointed applicant" would raise the conditioning issues on review before the court of appeals (see Interior Br. 38-39 n.40). Surely, it is the Commission, not the applicant, that represents the public interest; nor will it always be clear that the interest of the applicant and the public will always coincide.

text or history of the Power Act that Congress intended water rights also to be treated as reservations.¹²

This Court's decision in *Tuscarora*, moreover, fully supports our position. As this Court there emphasized, the "plain words" of the definition of "reservations" in Section 3(2) of the Act, "clearly * * * show that Congress intended the term 'reservations,' wherever used in the Act, to embrace only 'lands and interests in lands owned by the United States'" (362 U.S. at 111-114). Indeed, if the jurisdictional term "reservations" was meant to include reservations that may be affected by a project but which are not physically occupied by it, as respondents urge, it must follow that the Commission has jurisdiction to issue licenses for projects "within a reservation" under the public lands and reservations clause of Section 4(e) even though the projects do not physically occupy any reservation. But that result would be contrary to *Tuscarora's* teaching that the Commission's licensing jurisdiction only extends to projects "on" public lands and reservations. *Id.* at 113.¹³

¹² It is not at all clear, as the Secretary casually asserts, that Judge Anderson agreed with this aspect of the majority opinion. See Pet. App. 33.

¹³ There is no support for respondents' allegation that since the project "affects" the water rights of downstream reservations those water rights are reservations. See Interior Br. 40. The short answer is, of course, that Congress did not use the word "affect" in the present context and there is no reason to find its use by implication.

Furthermore, the approach of the court of appeals is inconsistent with other parts of the statutory scheme of the Power Act. As this Court observed in *Tuscarora Indian Nation*, 362 U.S. at 114 (emphasis in original), in regard to Section 10(e) of the Power Act, dealing with compensation for use of Indian reservation land, “[i]t therefore appears to be unmistakably clear that * * * ‘when licenses are issued involving the use of * * * *tribal lands embraced within Indian reservations* * * *’ Congress intended to treat and treated only with structures, lands and interests in lands owned by the United States, for, as stated, the section expressly requires the ‘reasonable annual charges’ to be paid to the *United States* for the use, occupancy, and enjoyment of ‘*its lands or other property*.’ ”

As we have urged in our initial brief (at 28-30, 33-36) such a construction—focusing on interests in land—logically follows from the legislative history of the Federal Water Power Act, which shows Congress was concerned with authorizing the Commission to grant rights-of-way over reservation land for the construction and operation of hydroelectric projects and that it modeled the Act on earlier right-of-way statutes under which hydroelectric projects on federal lands had been authorized.¹⁴

¹⁴ Respondents do not even respond to the Commission’s argument that Section 8 of MIRA was designed to authorize the Mission Indian Bands, subject to the approval of the Secretary of Interior, to alienate their reservation lands by contracting with *private parties*, for rights-of-way across their reservation lands and that nothing in Section 8 of MIRA or its legislature history even remotely suggests that Section 8 was designed to

III. THE ISSUE WHETHER SECTION 4(e) IS APPLICABLE TO RELICENSING IS NOT PROPERLY PRESENTED IN THIS CASE

Petitioners allege that Section 4(e) of the Power Act has no application to this case because this is a relicensing proceeding under Section 15 of the Power Act (16 U.S.C. 808) and Section 4(e) only applies to an application for original licenses (Pet. Br. 42-44). On the other hand, the Bands argue (Bands Br. 19 n.10) that Section 4(e) is applicable to relicensing under Section 15(a) of the Power Act because Section 15(a) authorizes the issuance of a new license, when an original license has expired, "upon such terms and conditions as may be authorized or required under the then existing laws and regulations." We agree with the Secretary (Interior Br. 21 n.24) that the issue is not properly presented and should not be decided in this case.

limit the long-standing sovereign authority of Congress to acquire or grant rights-of-way under its plenary power over public lands and reservations. See *Tuscarora Indian Nation*, 362 U.S. at 115-124; *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957); *United States v. Wittek*, 337 U.S. 346, 358-360 (1949); *Grand River Dam Authority v. FPC*, 246 F.2d 453, 455 (10th Cir. 1957).

While the United States District Court for the Southern District of California, where the water litigation is pending, has upheld the respondents' claims as to MIRA, that decision is still interlocutory. *Rincon Band of Mission Indians v. Escondido Mutual Water Co.*, Nos. 69-217-S, 72-276-S and 72-271-S (S.D. Cal. Jan. 10, 1980). In any event the district court indicated that it was not purporting to decide any issues regarding the Commission's jurisdiction to grant rights-of-way for power projects on Mission Indian Reservations. *Rincon Band of Mission Indians v. Escondido Mutual Water Co.*, Nos. 69-217-S, 72-276-S and 72-271-S (S.D. Cal. Dec. 10, 1980), slip op. 2-3 & n.1.

There is Commission precedent indicating that Section 4(e) has no application to relicensing proceedings;¹⁵ however, the Commission did not confront that issue in this case. In its view, this case involves only an original license since Lake Henshaw and its facilities, which are included in this new license, had not been included in the 1924 license (Pet. App. 133-137 & n.136). There is surely no reason to reach or to resolve the issue wheth-

¹⁵ *E.g.*, *Pacific Gas & Electric Co.*, 53 F.P.C. 523, 526 (1975) (holding that it was not necessary to adopt conditions proposed by the Secretary of Interior because the relicensing takes place "under Section 15 rather than Section 4(e)"); see also *Montana Power Co.*, 56 F.P.C. 2008, 2013 (1976) (distinguishing between an original license issued under Section 4(e) and a relicensing under Section 15(a)).

The Commission also refused to apply an Indian treaty to an application for annual licenses and a relicensing without specifically deciding whether Section 15 incorporated Section 4(e). *Northern States Power Co.*, 50 F.P.C. 753 (1973), *aff'd sub nom. Lac Courte Oreilles Band of Indians v. FPC*, 510 F.2d 198 (D.C. Cir. 1975). A statement in the District of Columbia Circuit's opinion by Judge Skelly Wright, from which Judge McKinnon dissented (510 F.2d at 212), seems to assume Section 4(e) would apply to a relicensing. That issue, however, was never briefed before the District of Columbia Circuit by the Commission in that case, which basically involves authority to issue annual licenses. Thus, the courts have never decided whether Section 4(e) applies to a relicensing. But see, *Northern States Power Co.*, 13 F.E.R.C. (CCH) ¶ 61,055, at 61,114 (1980), applying Section 4(e) to the relicensing without explanation on the remand from the District of Columbia Circuit.

It is true that in two recent cases the Commission did assume Section 4(e) applies to relicensing proceedings. *Pacific Gas & Electric Co.*, 25 F.E.R.C. (CCH) ¶ 61,010 (1983) (Opinion 187), and 25 F.E.R.C. (CCH) ¶ 61,344 (1983) (Opinion 187-A) and *Southern California Edison Co.*, 23 F.E.R.C. (CCH) ¶ 61,240 (1983). However, the Commission has recently requested the Ninth Circuit to remand those cases for further examination.

er Section 4(e) applies to "relicensings" where its applicability was not passed upon by the Commission.¹⁸

CONCLUSION

For the foregoing reasons, and those started in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 1984

I authorize the filing of this brief.

REX E. LEE
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¹⁸ There is, moreover, a serious issue whether the claim of petitioners, was preserved by petitioners on rehearing in accord with the requirements of Section 313(a) of the Power Act, 16 U.S.C. 8251(a). See Interior Br. 21 n.24; see also the petitions for rehearing of the Commission's initial opinion (Opinion 36) and the Commission opinion on rehearing (Opinion 36-A) filed by petitioners (COR 25,834-25,926, 26,394-26,414).

DEC 15 1983

ALEXANDER L. STEVAS.
CLERK

No. 82-2056

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO
and VISTA IRRIGATION DISTRICT, *Petitioners,*

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA and PALA BANDS
OF MISSION INDIANS, and THE SECRETARY OF INTERIOR IN
HIS CAPACITY AS TRUSTEE FOR SAID BANDS,
Respondents.

On Certiorari To The United States Court
Of Appeals For The Ninth Circuit

**BRIEF OF AMICI CURIAE AMERICAN PUBLIC POWER
ASSOCIATION, COLORADO RIVER WATER
CONSERVATION DISTRICT, AND KINGS RIVER
CONSERVATION DISTRICT IN SUPPORT OF PETITIONERS**

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December 15, 1983

TABLE OF CONTENTS

	Page
INTEREST OF AMICI	1
A. Amici And The Issues Presented	1
B. The Resolution Of The Issues By The Tribunals Below	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. THE DECISION OF THE NINTH CIRCUIT MAJORITY AS TO A SECRETARIAL VETO IS INCONSISTENT WITH THE STRUCTURE OF THE ACT AND CONGRESSIONAL INTENT	6
A. The Terms Of Part I Of The Federal Power Act Establish The Commission's Preeminent Role In Issuing Licenses	7
B. Congress Intended The Commission To Have The Final Word In Disputes With The Departments	11
C. The Act's Rehearing And Judicial Review Provisions Compel The Conclusion That The Commission, Rather Than A Secretary, Must Have Ultimate Control	14
II. THE NINTH CIRCUIT'S DECISION LEADS TO AN UNCHECKABLE SECRETARIAL VETO THROUGH UNREVIEWABLE IMPACT ON COMMISSION LICENSING DECISIONS	16
A. Disagreements Between The Commission And A Secretary Will Result In The Denial Of All License Applications And Ineffective Judicial Review	17
1. When The Commission Is Presented With Secretarial License Conditions Which It Believes To Be Unlawful, As Happened In This Case, A Deadlock Not Readily Susceptible Of Judicial Resolution Will Occur	17

Table of Contents Continued

	Page
2. When the Commission Is Presented With Secretarial Conditions Which Are Incompatible With The Commission's Findings Of Fact, As Happened In This Case, An Equally Intractible Deadlock Will Result	20
B. Even If Deadlock Can Be Avoided, A Secretarial Veto Not Controllable By Judicial Review Is Created	20
III. THE NINTH CIRCUIT'S HOLDING THAT WATER RIGHTS APPURTENANT TO RESERVATIONS OUTSIDE PROJECT BOUNDARIES ARE "RESERVATIONS" UNDER THE ACT IS A MISTAKEN AND UNNECESSARY INTERPRETATION	24
A. The Provisions Of Part I Of The Act Do Not Support The Ninth Circuit's Interpretation That "Reservations" Include Water Rights ..	24
B. The Court's Construction Of "Reservations" Is Inconsistent With The FPA As It Impermissibly Expands Both The Secretarial And FERC's Jurisdiction	28
CONCLUSION	29

TABLE OF AUTHORITIES

COURT CASES:	Page
<i>Arizona v. California</i> , 103 S.Ct. 1382 (1983) . . .	26, 27, 28
<i>Arizona v. San Carlos Apache Tribe</i> , 103 S.Ct. 3201 (1983)	28
<i>Barr v. Matteo</i> , 355 U.S. 171 (1957)	27
<i>Chemehuevi Tribe of Indians v. FPC</i> , 420 U.S. 395 (1975)	12
<i>Escondido Mutual Water Co. v. FERC</i> , 692 F.2d 1223 (9th Cir. 1982), <i>modified</i> , 701 F.2d 826 (9th Cir. 1983)	<i>passim</i>
<i>Escondido Mutual Water Co. v. FERC</i> , 701 F.2d 826 (9th Cir. 1983)	17, 19, 20
<i>FPC v. Tuscarora Indian Nation</i> , 362 U.S. 99 (1960) .	25
<i>First Iowa Hydro-Electric Cooperative v. FPC</i> , 328 U.S. 152 (1946)	26
<i>Lac Courte Oreilles Band v. FPC</i> , 510 F.2d 198 (D.C. Cir. 1975)	29
<i>NLRB v. Bell Aerospace Co.</i> , 416 U.S. 267 (1974)	14
<i>Nevada v. United States</i> , 103 S.Ct. 2906 (1983)	28
<i>United States v. Public Utilities Commission</i> , 345 U.S. 295 (1953)	12
<i>Winters v. United States</i> , 207 U.S. 564 (1908)	22, 24
AGENCY CASES AND OPINIONS:	
<i>East Bay Municipal Utility District</i> , 1 F.P.C. 12 (1932)	26
<i>Escondido Mutual Water Co.</i> , 6 F.E.R.C. ¶ 63,008 (June 1, 1977), <i>aff'd in part and rev'd in part</i> , 6 F.E.R.C. ¶ 61,189 (Feb. 26, 1979), <i>modified</i> , 9 F.E.R.C. ¶ 61,241 (Nov. 26, 1979), <i>rev'd</i> , 692 F.2d 1223 (9th Cir. 1982), <i>modified</i> , 701 F.2d 828 (9th Cir. 1983) 8, 21	
<i>Escondido Mutual Water Co.</i> , 6 F.E.R.C. ¶ 61,189 (Feb. 26, 1979), <i>modified</i> , 9 F.E.R.C. ¶ 61,241 (Nov. 26, 1979), <i>rev'd</i> , 692 F.2d 1223 (9th Cir. 1982), <i>modified</i> , 701 F.2d 828 (9th Cir. 1983)	<i>passim</i>
<i>Escondido Mutual Water Co.</i> , 9 F.E.R.C. ¶ 61,241 (Nov. 26, 1979), <i>rev'd</i> , 692 F.2d 1223 (9th Cir. 1982), <i>modified</i> , 701 F.2d 828 (9th Cir. 1983)	4, 21, 24

Table of Authorities Continued

	Page
<i>Essex Co.</i> , 56 F.P.C. 977 (1976)	26
<i>Pacific Gas & Electric Co.</i> , 6 F.P.C. 729 (1947)	29
<i>Pacific Gas & Electric Co.</i> , 25 F.E.R.C. ¶ 61,010 (Oct. 4, 1983)	27, 28
<i>Pigeon River Lumber Co.</i> , 1 F.P.C. 206 (1935)	10
<i>Portland General Electric Co.</i> , 10 F.P.C. 445 (1951), rev'd on other grounds sub nom. <i>Oregon v. FPC</i> , 211 F.2d 347 (9th Cir. 1954), rev'd, 349 U.S. 435 (1955)	9
<i>Rumford Falls Power Co.</i> , 36 F.P.C. 605 (1966)	26
<i>Seneca Nation of Indians</i> , 6 F.P.C. 1025 (1947)	26
<i>Southern California Edison Co.</i> , 23 F.E.R.C. ¶ 61,240 (May 18, 1983), reh'g denied, 24 F.E.R.C. ¶ 61,119 (July 22, 1983)	26, 27

STATUTES:

Federal Power Act, 16 U.S.C. §§ 791a *et seq.*

§ 3(2), 16 U.S.C. § 796(2)	2, 24, 25
§ 3(11), 16 U.S.C. § 796(11)	25
§ 3(12), 16 U.S.C. § 796(12)	24
§ 4(e), 16 U.S.C. § 797(e)	<i>passim</i>
16 U.S.C. § 797a	7
§ 6, 16 U.S.C. § 799	8, 9, 15, 17
§ 9(b), 16 U.S.C. § 802(b)	26
§ 10, 16 U.S.C. § 803	8
§ 10(a), 16 U.S.C. § 803(a)	8, 17, 20
§ 10(e), 16 U.S.C. § 803(e)	17
§ 10(g), 16 U.S.C. § 803(g)	8, 9, 15, 17
§ 11, 16 U.S.C. § 804	8
§ 12, 16 U.S.C. § 805	8
§ 15(a), 16 U.S.C. § 808(a)	19, 29
§ 18, 16 U.S.C. § 811	9

Table of Authorities Continued

	Page
§ 23(b), 16 U.S.C. § 817	8, 29
§ 27, 16 U.S.C. § 821	26
§ 313, 16 U.S.C. § 825l	14, 15, 16
§ 313(a), 16 U.S.C. § 825l(a)	15
§ 313(b), 16 U.S.C. § 825l(b)	15, 17, 19
Act of March 3, 1921, 41 Stat. 1353	7
Act of March 7, 1928, 45 Stat. 212-213	14
Act of June 23, 1930, 46 Stat. 797	7
Administrative Procedure Act, 16 U.S.C. §§ 701-706 .	18
Cal. Water Code App. § 59-2 (1968 & Cum. Supp. 1983)	1
Col. Rev. Stat. § 37-47-101 (1974 & Cum. Supp. 1981) .	1
Department of Energy Organization Act of 1977, 91 Stat. 565	7
Federal Water Power Act of 1920, 41 Stat. 1063 ..	7, 9, 11
§ 4(d), 41 Stat. 1065-66	7, 14
Mission Indian Relief Act, 26 Stat. 712 (1981)	3, 5
Public Utility Act of 1935, 49 Stat. 838	7, 9, 14, 16

MISCELLANEOUS:

<i>Investigation of Federal Regulation of Power: Hearings Pursuant to S. Res. 80 and on S. 3619 Before the Senate Comm. on Interstate Commerce, 71st Cong., 2d Sess. (1930)</i>	<i>12, 13, 14, 16</i>
<i>Federal Power Commission: Hearings on H.R. 11408 Before the House Comm. on Interstate and Foreign Commerce, 71st Cong., 2d Sess. (1930)</i>	<i>13, 14, 16</i>
<i>H.R. 408, 64th Cong., 1st Sess. § 1, 53 Cong. Rec. 560, 561 (1916), reprinted in S. Doc. No. 676, 64th Cong., 2d Sess. 3-4 (1917)</i>	<i>10</i>
<i>Water Power: Hearings Before the House Comm. on Wa- ter Power, 65th Cong., 2d Sess. 678 (1918)</i>	<i>11</i>
<i>59 Cong. Rec. 1564 (1920)</i>	<i>12</i>

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2056

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO
and VISTA IRRIGATION DISTRICT, *Petitioners,*

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA and PALA BANDS
OF MISSION INDIANS, and THE SECRETARY OF INTERIOR IN
HIS CAPACITY AS TRUSTEE FOR SAID BANDS, *Respondents.*

On Certiorari To The United States Court
Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN PUBLIC POWER
ASSOCIATION, COLORADO RIVER WATER
CONSERVATION DISTRICT, AND KINGS RIVER
CONSERVATION DISTRICT IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

A. Amici And The Issues Presented

Amici herein are the American Public Power Association ("APPA"), the Colorado River Water Conservation District of Colorado ("CRWCD"), and the Kings River Conservation District of California ("KRCD"). APPA is a national service organization representing more than 1,750 municipal, cooperative, and state-owned electric utilities in 49 states, many of whom operate or seek to operate hydroelectric projects under license from the Commission. CRWCD and KRCD are political subdivisions of their respective states¹ and are both actively engaged in the development of hydroelectric projects as licen-

¹ See Col. Rev. Stat. § 37-47-101 (1974 & Cum. Supp. 1981); and Cal. Water Code App. § 59-2 (1968 & Cum. Supp. 1983).

sees, license applicants or preliminary study permit holders.² Consent from counsel for all parties to the filing of this brief has been filed with the Clerk of this Court.

Both of the questions addressed by amici involve the interpretation of the first of several provisos to the licensing authority set out in § 4(e) of the Federal Power Act,³ which deals with the relative responsibilities of the Cabinet Secretaries and the Federal Energy Regulatory Commission ("FERC" or "Commission") when a license relating to an existing or proposed hydroelectric project is to be "issued within any reservation."

The initial question here presented is whether, in case of a dispute over the consistency of license conditions for a license to be "issued within any reservation" with the requirements of the Act as a whole, the Commission or the Secretary of the Cabinet Department under whose supervision such "reservation" falls shall make the final administrative decision.⁴

This case also presents the question of the meaning of the term "reservation," as defined in § 3(2) of the Act, and employed in § 4(e) of the Act, when a license is to be "issued within

² CRWCD has a license application pending before the Federal Energy Regulatory Commission in Project No. 2757, holds preliminary permits in Project Nos. 6644 and 5866, and has an application for a preliminary permit pending in Project No. 2779. KRCD holds licenses in Project Nos. 2890 and 2741.

³ Occasionally referred to as "the Act" or "the FPA." 16 U.S.C. §§ 791 *et seq.* Section 4(e) appears at 16 U.S.C. § 797(e).

⁴ The Secretaries involved in supervising "reservations" as defined in FPA § 3(2), 16 U.S.C. § 796(2), are: the Secretary of Agriculture as to "national forests"; the Secretary of the Interior as to "tribal lands embraced within Indian reservations"; the Secretary of the Army, Navy or Air Force as to "military reservations"; and usually the Secretary of the Interior but occasionally others as to "other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes."

any reservation." The specific question here is whether a licensed project, the boundaries of which are distant from the physical confines of any reservation, is nonetheless "within" a "reservation," for purposes of giving the relevant Secretary licensing authority, solely by virtue of the project's impact on downstream water rights appurtenant to the reservation.

B. The Resolution Of The Issues By The Tribunals Below

The decision below reversed an order of the FERC issuing a license to operate and maintain a hydroelectric project to the Escondido Mutual Water Company, the City of Escondido, California, and the Vista Irrigation District (jointly referred to herein as "Escondido"). The Ninth Circuit majority held that FERC had violated the first proviso of Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), by issuing a license without conditions deemed necessary by the Secretary of the Interior for the adequate protection and utilization of the La Jolla, Rincon, San Pasqual, Pauma, Yuima and Pala Indian Reservations, and had also violated the terms of the Mission Indian Relief Act.

The Commission had before it competing applications for operation of Project No. 176: one, a request for renewal of a 1924 license issued to Escondido;⁵ the other, a request for a non-power license for five Indian Bands. The Department of the Interior recommended federal takeover of the project, or in the alternative, the issuance of a license to the Bands. The Commission determined that takeover was inappropriate and that none of the applications would result in satisfactory projects. Pet. App. 109-116, 174.⁶ It issued a license to Escondido

⁵ The 1924 license was held by the Escondido Mutual Water Co.; the application for a new license was on behalf of Mutual and the City of Escondido. Vista Irrigation District was ultimately included in the license. The three licensees are herein referred to as "Escondido."

⁶ "Pet. App." references are to the Appendix to Petition for Writ of Certiorari filed in this docket.

based upon Escondido's application but with substantial modifications so that the license would not interfere or be inconsistent with the purpose for which the La Jolla, Rincon and San Pasqual Reservations were created or acquired. Pet. App. 110. The Deputy Under Secretary of the Interior had submitted to the Commission preliminary and final sets of "conditions for Project No. 176 pursuant to Section 4(e) of the Federal Power Act in the event a new power license is issued to [Escondido]." J.A. 49-61, 218-42.⁷ The Commission rejected or modified many of Interior's conditions, finding them unlawful, in conflict with the findings of fact of the Commission, or unnecessary in light of the modifications of Escondido's license application made by the Commission. Pet. App. 143-155. The Commission also struck certain of the conditions suggested by Interior aimed at safeguarding the Pauma, Yuima and Pala Reservations, reasoning that FPA § 4(e) did not require them inasmuch as the construction, operation and maintenance of project works did not take place within those reservations, and that the conditions were not in accord with the plan for improvement of the area's waterways found by the Commission to be best adapted. Pet. App. 137-38, 150-51, 330-32.

The Ninth Circuit reversed the actions of the Commission, holding that by failing to include Interior's conditions in the license issued to Escondido, the Commission had violated the Federal Power Act's provision that licenses issued within reservations "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." The court failed to address the Commission's findings that Interior's conditions were unlawful, contrary to its findings of fact, or unnecessary, but did hold that the Commission had erred in holding that Project No. 176 was not within the Pauma, Yuima and Pala Reservations. The court held that a license which might allow

⁷ "J.A." references are to the Joint Appendix to be filed in this docket.

interference with water rights appurtenant to a reservation is issued "within" that reservation.

We address these questions *seriatim*.⁸

SUMMARY OF ARGUMENT

The Ninth Circuit majority has held that when a license is to be issued "within any reservation," the first proviso to Section 4(e) of that Act requires the Commission to accept, *in haec verba*, license conditions which may be sought by the Secretary of a relevant department. The basic evil of this holding is that it strips from the Commission, which has the statutory responsibility for assuring that the project is consistent with the public interest, the right even to examine whether the proposed conditions are legal, consistent with the facts as found upon the record which the Commission must amass, or destructive of the public interest. Thus, the Ninth Circuit majority's erroneous construction of Section 4(e) will give executive agencies the uncheckable power to vitiate the licensing process for projects on or upstream from federal reservations by stripping the FERC of its statutory role as the protector of valid federal interests and the arbiter of the public interest, subject, of course, to judicial review, and substituting therefor what is an effectively unreviewable fiat of an executive agency. Moreover, this construction would result in a determination of claims to the use of water by executive agency decree, a result repugnant to the decision of Congress to leave the resolution of such issues to the courts.

Judicial review, which is assumed by the majority below to be a potential *deus ex machina* to salvage the administrative impasse erected by its interpretation, is simply unworkable. The Ninth Circuit's resolution will, if affirmed by this Court, create an administrative morass in which conflicts within the federal government inevitably will result in deadlock, costly

⁸ Because the construction of the Mission Indian Relief Act is an issue more narrow in impact, it is not discussed herein.

and unproductive litigation, years of wasteful delay in the development and improvement of important national resources, and, in the cases where licensing is permitted, the ultimate licensing of inferior hydroelectric projects.

It would appear that the Ninth Circuit's construction of "reservation" would necessarily extend the Commission's licensing authority to embrace projects far from public lands, reservations, or navigable waters whenever they would have any impact on hydrological flows in downstream reservations. This would effect a radical (and almost unbounded) increase in the Commission's licensing jurisdiction, contrary to the language of the statute, and evidently unconsidered by the court below. This holding dramatically amplifies the destructive impact of the Ninth Circuit's subordination of the Commission to the Secretary.

ARGUMENT

I. THE DECISION OF THE NINTH CIRCUIT MAJORITY AS TO A SECRETARIAL VETO IS INCONSISTENT WITH THE STRUCTURE OF THE ACT AND CON- GRESSIONAL INTENT

The Ninth Circuit's opinion establishes a dual⁹ control of the licensing process "within" reservations which is incompatible with the Federal Power Act as a whole, especially its provisions for judicial review. These problems were unexamined below because the court declined to evaluate the Commission's findings concerning the lawfulness and propriety of the Secretary's conditions. Examination of these problems demonstrates the error of the Ninth Circuit's Secretarial veto construction.

⁹ In light of the Ninth Circuit's holding on the meaning of "reservation" expanding the impact of the Secretarial veto holding to apply to any impact upon water rights, there could well be triple or quadruple control since many, if not most, dam sites in the West would affect water rights associated with more than one government reservation.

A. The Terms Of Part I Of The Federal Power Act Establish The Commission's Preeminent Role In Issuing Licenses

Part I of the Federal Power Act, 16 U.S.C. § 791a *et seq.*, was originally enacted in 1920 as the Federal Water Power Act,¹⁰ modified in 1930 to change the membership of the Federal Power Commission,¹¹ and supplemented substantially in 1935 when Parts II and III of the Act were added by the Public Utility Act of 1935.¹² Part I of the Act gives the Federal Energy Regulatory Commission¹³ broad power to license hydroelectric projects. Thus, under Section 4(e), 16 U.S.C. § 797(e),¹⁴ the Commission is authorized to issue licenses:

for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam. . .

¹⁰ 41 Stat. 1063. The Act of March 3, 1921, 41 Stat. 353, revoked the Commission's authority to grant licenses for project works "within the limits as now constituted of any national park or national monument." See 16 U.S.C. § 797a.

¹¹ 46 Stat. 797.

¹² 49 Stat. 838.

¹³ The duties of the Federal Power Commission were transferred to the FERC by the Department of Energy Organization Act of 1977. 91 Stat. 565.

¹⁴ Section 4(e) was renumbered in 1935, having previously been Section 4(d) of the Federal Water Power Act of 1920, 41 Stat. 1065-66.

The Commission has exclusive authority to issue licenses enabling citizens, corporations, states, or municipalities to construct, operate, and maintain projects on the navigable waters or public lands and reservations of the United States. FPA §§ 4(e), 23(b), 16 U.S.C. §§ 797(e), 817. The Commission may impose conditions upon a licensee, which conditions must be in conformity in the Act and must be included in the license. FPA §§ 6, 10(g), 16 U.S.C. §§ 779, 803(g); J.A. 325. Such conditions most often arise from the exercise of the Commission's duty pursuant to FPA § 10(a), 16 U.S.C. § 803(a), to ensure that the project adopted will be "best adapted to a comprehensive plan for improving or developing a waterway or waterways . . ." but are also imposed for numerous other purposes required by the Act, when called for in particular cases, pursuant to *inter alia*, §§ 11 and 12, 16 U.S.C. §§ 804, 805. There are other conditions which are required by the Act. See, *e.g.*, §§ 6, 10.

The dispute here arises from the first proviso of Section 4(e). In its entirety, that proviso to the licensing authority set out above states:

Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation:

It cannot be overemphasized that the only sort of dispute which would raise the legal issues here presented is one in which a Secretary urges conditions which the Commission finds unlawful or inconsistent with the public interest. The Commission must find, subject to judicial review, that a license will not interfere with or be inconsistent with the purpose for which the reservation was created or acquired before a license can issue.

Although the first proviso of § 4(e) states that a license "shall" contain Secretarial conditions regarding reservations, this requirement is qualified by other aspects of Part I of the Act. The first qualification is that the license must contain, and not merely be subject to, the Secretarial conditions. Thus, while such conditions originate with the concerned Secretary, they must be promulgated, if at all, by the Commission pursuant to FPA §§ 6, 10(g). This qualification brings the conditioning process under Commission control. All conditions for the adequate protection and utilization of reservations, like conditions for lights, signals and fishways pursuant to FPA § 18, 16 U.S.C. § 811, are prescribed by the Commission.¹⁵ This may be contrasted with the power of the Secretary of the Army to issue rules and regulations in the interest of navigation governing the operation of certain project works, which power is exercised independently of the Commission. FPA § 18.¹⁶

The second qualification, found in the express language of the § 4(e) proviso, is that the necessary primary finding that a license will not interfere or be inconsistent with the purpose for which a reservation was created or acquired is entrusted to the

¹⁵ Section 18 begins:

The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce as appropriate.

It has long been Commission practice to regard this statutory "shall," like the § 4(e) "shall," as directory rather than mandatory. *See, e.g., Portland General Electric Co.*, 10 F.P.C. 445, 456-57, 458 (1951), *rev'd on other grounds sub nom. Oregon v. FPC*, 211 F.2d 347 (9th Cir. 1954), *rev'd*, 349 U.S. 435 (1955).

¹⁶ Prior to 1935, provisions for fishways, lights, and signals were under the control of the Secretary of War, not the Commission. 41 Stat. 1073, 49 Stat. 458.

Commission, not the concerned Secretary.¹⁷ This statutory language has long been regarded by the Commission as giving it the final word in disputes concerning the propriety of issuing licenses within reservations. See *Pigeon River Lumber Co.*, 1 F.P.C. 206, 209 (1935). The Commission's findings of fact are the basis for its actions. License conditions must ultimately be judged in terms of their consistency with the Commission's findings of fact, and the Commission should be permitted to make that judgment, subject to judicial review. The Ninth Circuit's construction, which allows Secretarial conditions to render infeasible a project when deemed necessary by the Secretary despite a finding by the Commission that the license is *not* inconsistent with the reservation's purpose, Pet. App. 24, contravenes Congressional intent as embodied in the proviso.

Plainly, the Commission was intended to be in control of the entire licensing process. The sole exception to the Commission's control of the licensing process is found in the second proviso to FPA § 4(e), which forbids the issuance of a license

¹⁷ The debates over the bill which became the Federal Water Power Act and its precursors consumed some six years. It may be significant that one of those precursors, H.R. 408, 64th Cong., 1st Sess. § 1, 53 Cong. Rec. 560, 561 (1916), *reprinted in* S. Doc. No. 676, 64th Cong., 2d Sess. 3-4 (1917), which was passed by the House of Representatives on January 8, 1916, 53 Cong. Rec. 744, provided for the issuance of leases by the Secretary of the Interior, provided:

That such leases shall be given within or through any of said national forests or other reservations only upon a finding by the Secretary of the department under whose supervision such forests, national monument, or reservation falls that the lease will not injure, destroy, or be inconsistent with the purpose for which such forest, national monument, or reservation was created or acquired.

Thus, the Federal Power Act, in making the Commission the finder of fact, represents a deliberate shift from an earlier proposal under which the concerned department head would be the finder of fact concerning the level of interference with a reservation with an explicit veto power.

affecting the navigable capacity of navigable waters of the United States until the plans of all project works affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army. There the statute sets up a clear allocation of authority: the Commission may find on the record that a project is in the public interest, but absent the necessary approval it is explicitly forbidden to issue a license. The fact that there was a clear veto in the second proviso of § 4(e) suggests that Congress did not intend to create an indirect Secretarial veto respecting reservations in the first proviso.

B. Congress Intended The Commission To Have The Final Word In Disputes With The Departments

The legislative history of the Federal Water Power Act of 1920, 41 Stat. 1063, is of little help in determining whether the Commission could modify Secretarial conditions, because the Federal Power Commission established thereby consisted of the Secretaries of the Interior, Agriculture and War, who among them had supervision of virtually all federal reservations.¹⁸ Disagreements could presumably be settled among the Commissioners, because they were the Secretaries as well. However, the relationship between the Commission and the departments was a focal point of the 1930 Congressional hearings on bills to sever the Commission from the departments and establish it as an independent body.¹⁹ These

¹⁸ Interior had jurisdiction over national parks, national monuments, and Indian reservations; Agriculture had jurisdiction over national forests; and War had jurisdiction over military reservations.

¹⁹ Although we believe the pre-1930 legislative history to be largely irrelevant, there are two items in the early legislative history which provide some support for the Secretarial supremacy construction. One is a somewhat equivocal statement by Agriculture Secretary Houston during hearings on a precursor to the Federal Power Act that he believed that the bill required the assent of the concerned department head prior to the licensing of a project within a reservation. *Water Power: Hearings Before the House Comm. on Water Power*, 65th Cong., 2d Sess. 678 (1918). The other is a statement by

hearings unequivocally demonstrate that the Commission as a whole was understood to have the final word on projects, even those within reservations.

Representations as to the jurisdiction of the Commission (vis-a-vis that of its then members) appear at several places in the 1930 history, and do not appear to have been challenged or even to have been the subject of dispute. Thus, O. C. Merrill, the architect and "one of the principal draftsmen"²⁰ of the Federal Water Power Act and Executive Secretary of the Commission throughout most of its first decade, clearly stated that when disputes arose, even concerning reservation lands such as national forests, the Commission had the final say, not the department most directly involved.²¹ Acting Commission

Senator Walsh, made during floor debate on an amendment to the Federal Power Act to create a tribal veto for projects on Indian lands ceded by treaty, that the head of the concerned department must agree to the issuance of a license within a reservation under his supervision. 59 Cong. Rec. 1564 (1920). As we note, however, the later history of the Act was based upon much clearer and far less equivocal representations as to Commission power, upon which representations Congress acted to modify the Act consistent therewith.

²⁰ *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 418 n. 24 (1975). See also *United States v. Public Utilities Comm'n*, 345 U.S. 295, 305 n. 10 (1953).

²¹ Mr. Merrill testified before Congress in 1930, as follows:

In my opinion the best way to maintain the jurisdiction and interests of the three departments [when an independent commission is established] is to have the field work in so far as it relates to the issuance of licenses, originally handled as it has been ever since I have been with the Federal Power Commission, through the departments, leaving the final say to the Federal Power Commission. But the three departments have no final say in those matters.

Mr. Merrill answered a specific question about how conflicts between the Agriculture Department and an independent Commission over projects in national forests would be handled as follows:

The Agricultural Department in such case is cooperating with this new commission, and its officers are making reports upon

Chief Counsel Lawson testified that the Commission "has power to overrule the head of a department as to the consistency of a license with the purpose of any reservation."²² The Chief Engineer of the Forest Service expressed concern over the inability of the Forest Service to influence the issuance of licenses in national forests should an independent Commission with its own field engineers be established. He gave no suggestion that the Secretary of Agriculture would be able to elevate departmental interests above the Commission's determination through a supreme conditioning authority, as would be the case were the majority holding below to have been thought to be the law.²³ And both the Secretaries of Interior and Agriculture testified that, in their view, departmental interests would be adequately protected by the ability of the departments to intervene in Commission proceedings and present their arguments and reports.²⁴ There is no indication in the 1930 legislative materials that a Secretarial veto was thought to exist with

certain projects, with recommendations to the Federal Power Commission. But there is where the responsibility ends. The decision rests with the Federal Power Commission.

Questioning concerning conflicts between the Commission and the departments continued. Mr. Merrill observed:

It came up while I was in the commission, and we took the position that the commission's decision was final.

Investigation of Federal Regulation of Power: Hearings Pursuant to S. Res. 80 and on S. 3619 Before the Senate Comm. on Interstate Commerce, 71st Cong., 2d Sess. 280-281 (1930).

²² *Id.* at 358.

²³ *Federal Power Commission: Hearings on H.R. 11408 Before the House Comm. on Interstate and Foreign Commerce, 71st Cong., 2d Sess. 6-7, 14-15 (1930) (Testimony of T. W. Norcross).*

²⁴ *Id.* at 45-46 (Testimony of Agriculture Secretary Hyde), 48-49 (Testimony of Interior Secretary Wilbur). Secretary Wilbur stated:

I agree with Secretary Hyde that we can well allow these departments to be represented at hearings before the commission to present phases of departmental interest, rather than to have the control remain in the departments. Otherwise, even though

respect to projects on reservation lands by anyone who was involved with the Commission.²⁵

**C. The Act's Rehearing And Judicial Review Provisions
Compel The Conclusion That The Commission, Rather
Than A Secretary, Must Have Ultimate Control**

The construction of the Secretary's conditions as immutable is also undermined by the provisions of Section 313 in Part III of the Act, 16 U.S.C. § 825l containing administrative provisions governing rehearing and judicial review of Commission actions. Part III was enacted in Title II of the Public Utility Act of 1935, 49 Stat. 838, approved August 26, 1935, which Title also reenacted FWPA § 4(d) as FPA § 4(e). As has been discussed *supra*, Congress had been apprised in 1930 of the Commission's view concerning its power to overrule Secretaries when appropriate. Congress' reenactment of § 4(d) as § 4(e), when taken together with the provisions of Part III which presume the supremacy of the Commission, should be conclusive on the question of the Commission's authority to modify or reject proposed Secretarial conditions. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).

you set up the commission, you will leave in the hands of the Secretaries, or in the hands of the bureau heads, the power to negate whatever the commission may want to do. . . .

I cannot conceive of this Federal Power Commission really being effective unless it controls all power sites where it grants licenses, for if you have to ask permission of this department or that department, there will be difficulties that will be absolutely impossible to overcome.

Id. at 48-49.

²⁵ Secretary Wilbur's testimony concerning the requirement of his approval for a license on the Flathead power site, *Hearings on S. 3619* at 326, should not be mistakenly thought to refer to any requirement derived from the Federal Power Act. Special legislation related to the Flathead power site specifically called for the approval of Interior prior to the issuance of any license. Act of March 7, 1928, 45 Stat. 212-213.

Pursuant to FPA § 313, applications for rehearing are addressed to the Commission, which can modify or set aside, in whole or in part, any finding or order made or issued by it under the Act. Aggrieved parties may petition for review of Commission orders in United States Courts of Appeals, with issues on review generally limited to those presented to the Commission on rehearing. Commission action upon an application for rehearing is an absolute prerequisite for judicial review. Upon review, the Commission's findings of fact, if supported by substantial evidence, are conclusive. The Commission, if ordered by the court, may take further evidence, modify its findings of fact, and recommend changes in its order. A judgment and decree of the Court of Appeals is final, subject to review by the Supreme Court on certiorari or certification.

These review provisions are incompatible with absolute Secretarial control over license conditions. In the first place, § 313(b) establishes the Commission as the supreme finder of fact. As the Bands recognize in their Brief in Opposition to Petition for Writ of Certiorari at 25, Secretarial control implies that the Secretarial conditions must be governed by Secretarial findings of fact reviewable on a substantial evidence standard. This is totally contrary to § 313(b); besides, it would invite stalemates where the Commission and the Secretary (or Secretaries) make opposing findings of fact, all of which are by substantial evidence and, hence, all of which must be upheld. Section 313(b) says that the *Commission's* findings shall be conclusive, and this provision is fundamentally incompatible with Secretarial supremacy.

In addition, the rehearing provisions of § 313(a) grant the Commission unqualified authority to modify or abrogate its orders at any time prior to the filing with a Court of Appeals of the record in a proceeding. There is no correlative power for a Secretary to abrogate or modify his conditions. This, like FPA §§ 6 and 10(g), is an indication that the ultimate authority over the contents of a license must lie with the Commission, not the Secretaries.

Moreover, if the Commission cannot modify or reject a Secretarial condition, then § 313 commands a useless act as a prerequisite for appeal of a Secretarial condition: an application for rehearing which the Commission is powerless to grant. There is no provision for petitioning a Secretary for rehearing as a prerequisite to judicial review.

The unambiguous evidence for Commission supremacy contained in Part III of the Act is most important, because by 1935 when Part III was added the Commission had become firmly established as an agency independent of the Secretaries of the departments. The potential for conflict between the Commission and the departments was visible, not latent as it had been before 1930 when the Commission consisted of the three Secretaries with supervisory authority over federal reservations. Even before 1930, as the 1930 hearings show, the Commission overruled the departments when necessary. In these circumstances, the provisions of Part III must be understood to govern the construction of the reenacted § 4(e) of Part I, and to render the phrase "shall be subject to and contain" directory rather than mandatory.

II. THE NINTH CIRCUIT'S DECISION LEADS TO AN UN-CHECKABLE SECRETARIAL VETO THROUGH UN-REVIEWABLE IMPACT ON COMMISSION LICENSING DECISIONS

The Ninth Circuit majority failed to see any inconsistency between the provisions of the Act as a whole and its construction of § 4(e) making Secretarial conditions binding on the Commission. It stated its view of the matter as follows:

In the case of a project within a reservation, once the Secretary of the Interior has propounded those conditions deemed necessary for the protection and utilization of the reservation, the Commission is free to modify the proposal in other ways, but not by altering or omitting Interior's conditions, to make it feasible and beneficial to the public. If this cannot be done, the Commission may decline to issue a license at all.

Pet. App. 24. The majority did not believe that this conditioning authority would invest Interior with an "unconditional veto

power," because "[a]ny license issued by the Commission which includes conditions propounded by Interior will be subject to judicial review under Section 313(b) of the FPA." Pet. App. 24-25, 32-33.

The Ninth Circuit's decision will result in either stalemate or the issuance of licenses that do not meet the § 10(a) standard. That decision should be reversed and a construction of the first proviso of § 4(e) adopted which makes the Secretarial conditions not binding terms, but weighty recommendations that may not be modified or rejected without specific Commission findings to support its actions.

A. Disagreements Between The Commission And A Secretary Will Result In The Denial Of All License Applications And Ineffective Judicial Review

1. When the Commission is presented with Secretarial license conditions which it believes to be unlawful, as happened in this case, a deadlock not readily susceptible of judicial resolution will occur

FPA Sections 6 and 10(g), 16 U.S.C. §§ 799, 803(g), declare that *all* special license conditions binding on a licensee are to be prescribed by the Commission in conformity with the Act. The Commission lacks the power to prescribe a license condition which it believes to be unlawful, *i.e.*, not in conformity with the Act. The Commission expressly found that Interior's proposed Condition 8 was "contrary to the first proviso of Section 10(e) of the Federal Power Act," and that its proposed Condition 11 was "an unlawful delegation of Commission authority to Interior and the La Jolla, Rincon and San Pasqual Bands." Pet. App. 151-52, 154-55. The Commission has no legal power to issue a license containing these conditions.

If, as the Ninth Circuit majority held, the Commission had no legal power to issue a license to Escondido excluding those conditions because of the first proviso of § 4(e), then the Com-

mission would be paralyzed.²⁷ Its only lawful course of action would be to issue an order denying all license applications on the ground that the Secretary of the Interior had insisted on unlawful license conditions. A frustrated applicant could petition for review of the Commission's orders pursuant to FPA § 313(b), but the reviewing court's powers would be limited by statute to "affirming, modifying, or setting aside, in whole or in part, any such order of the Commission." Thus, if the reviewing Court agreed with the Commission that the Secretary's conditions were unlawful, it could only affirm the Commission's refusal to issue any license. A court cannot authorize the Commission to ignore the statute. Certainly nothing in § 313(b) authorizes a court to reach behind a Commission order and, by its review, control a Secretary's actions.

The Secretary's actions may be reviewed only via the Administrative Procedure Act or by mandamus. However, this would entail a split review procedure for resolving disagreements between the Commission and a Secretary, with the Commission's actions reviewable in one forum and the Secreta-

²⁷ It is possible to argue that, because of the mandatory nature of Secretarial conditions, the Commission had legal authority to issue a license containing these conditions, and that the question of lawfulness should be left to the courts. However, there would be no juridical advantage to be gained by requiring the FERC to adopt a condition it believes unlawful, frivolous or unnecessary in order to permit a party to challenge the Commission's order in a reviewing court. *Amici* are not aware of any instance in Anglo-American law where a decisional authority is required to state that it believes a result lawful when it does not. (There may be other legal systems where such a Kafkaesque result is acceptable.) Moreover, there may not necessarily be a party who elects to take an appeal. Certainly the Commission has no statutory authority to petition for review of its own orders. Accordingly, conditions believed by the Commission to be unlawful might remain undisturbed for want of judicial review.

ry's in another. This is the precise outcome which the Ninth Circuit panel envisioned in its initial decision, Pet. App. 24-25, and unanimously rejected as clearly erroneous in response to the Commission's petition for rehearing, Pet. App. 32-33, 39-40. The majority concluded that because there was no split review, the Secretary's actions must also be reviewable under FPA § 313(b). This is erroneous because it violates the plain language of § 313(b).

Assuming that a court could send back a case to FERC with instructions to ignore an unlawful Secretarial condition, there is nothing to prevent a Secretary from replacing the rejected condition with yet another condition that would preclude the project's development. A licensing proceeding could be tied up for years in this manner, giving the Secretary a *de facto* veto by exhaustion. In the interim, where there is a new project proposed, there will be no development. In the case of an existing project, the FERC will issue annual licenses for the operation of the project under the terms and conditions of the expired license pursuant to FPA § 15(a), 16 U.S.C. § 808(a). In the Escondido case, the existing project would be operated under terms substantially less favorable to the Indians than those of the license issued by the FERC in the relicensing case.

The Act must not be construed to countenance this result. The Commission must have the authority to modify or strike unlawful Secretarial conditions so as to enable it to proceed expeditiously with the task of crafting and issuing a license, subject, of course, to judicial review.

2. When the Commission is presented with Secretarial conditions which are incompatible with the Commission's findings of fact, as happened in this case, an equally intractable deadlock will result

The same problem that exists with respect to disagreements over the lawfulness of conditions also exist with respect to disagreements over findings of fact. In this form, however, the problem is more likely and hence more significant.

Many of Interior's conditions embodied its disagreement with the Commission's subsequent findings. For example, Interior's Condition 6, which required releases of water to recharge the Pauma and Pala groundwater basins, was flatly incompatible with the Commission's finding that the license it issued, which prohibited such releases, provided for the best use of the San Luis Rey and Escondido Canal waterways for beneficial public uses. Pet. App. 110, 130, 150-151. The Commission could not have issued a license containing Interior's Condition 6 without impermissibly ignoring its own finding of fact. If the Commission cannot discard or modify such conditions, it can issue no license without abdicating its statutory fact-finding responsibilities.

B. Even If Deadlock Can Be Avoided, A Secretarial Veto Not Controllable By Judicial Review Is Created

If, despite the statutory obstacles just described, the Commission can lawfully issue a license containing Secretarial conditions it deems detrimental to the public interest, we must address the problem of the "unconditional Secretarial veto" raised below. The Ninth Circuit concluded that this "spectre" was illusory and that any ills resulting from improper Secretarial conditions could be remedied on review of the order issuing the license. Pet. App. 24-25, 32-33. This is incorrect; effective judicial review of the propriety of the Secretary's conditions is not possible unless the Commission is free to modify or reject those conditions. The Ninth Circuit's holding must inevitably lead to the issuance of inferior licenses. Accordingly, it should be reversed.

Any conditions deemed necessary by a Secretary are normally transmitted to FERC in what is known as a "4(e) letter," commenting on the originally filed application for license, which FERC routinely sends to affected departments for consideration during the licensing process. See J.A. 49-61. However, in a typical case when the Commission issues a license, it makes alterations in an applicant's license proposal, pursuant to § 10(a) and other provisions of the Federal Power

Act. This was the case here, both in the Initial Decision, J.A. 325-333, and the Order Issuing License, Pet. App. 170-221, 257-273. These modifications are made to improve the project in the public interest. Pet. App. 110, 117. However, if Secretarial conditions must be accepted without modification by the Commission, then the Commission is effectively frozen into the applicants' initial license applications together with the Secretary's conditions for protection of the reservation, *see* Pet. App. 147, rather than having the conditions subject to scrutiny by all sides, J.A. 42-26. Because the Secretary is, by virtue of his role, preoccupied with the more narrow, reservation interests, it is almost inevitable that the Secretary's solutions to the problem of protecting a reservation will not reflect the broader public interest required of the Commission. As Interior's representative stated below (J.A. 182):

[Interior's] trust responsibility to Indians . . . may preclude the kind of fairness, the kind of balancing of interests that normally goes on in the political process.

There is an additional concern with the result below that should not be overlooked. The possibility of an Interior Secretary who would be less generous to the Bands than would the Commission in imposing adequate conditions for the public interest, including the interest of the Bands, is not altogether remote; the ruling below would presumably bar the FERC from conditioning a license in a way more favorable to the Bands.

The end result for at least three of the affected reservations²⁸ in this case, depending on the interpretation affirmed by this Court, is startling. The FERC noted that the Interior conditions would require the FERC, despite the pendency of water rights litigation in a federal district court for over ten years, to "adjudicate the merits of the existing water rights controversy between the Bands and Mutual and Vista," something the

²⁸ These reservations are the La Jolla, Rincon, and San Pasqual reservations, which are traversed by the Project and which the FERC held subject to the Section 4(e) proviso.

Commission could not do. Pet. App. 148. In their stead, the Commission imposed a condition (Article 29, Pet. App. 259-61) that required the licensees to yield water to the affected reservations occupied by Project No. 176 as the members of the Bands developed a need for the water because of additional agricultural, domestic, stockwatering or small commercial consumption, including additional permanent dwellings. Pet. App. 140, 148-149, 260 and esp. 173-190. The Commission held that this condition would give the affected reservations more than the *Winters* doctrine,²⁹ which is restricted to reserved natural flows. Pet. App. 140. Thus, the Commission's response to Interior's conditions was fashioned to provide for the possible future needs of the three reservations occupied by the project. However, FERC noted that state law would not permit the off-reservation sale of water by the Bands in excess of their use, although the Bands requested water to cover such sales. Pet. App. 129. Thus, only the FERC license condition modifying conditions sought by Interior would be permissible under both state and federal laws, and ensure the simultaneous operation of the hydro project consistent with the purpose of the reservations. As to the water rights claims of all six reservations, the Commission deferred to the pending court proceedings. Pet. App. 259.

By forcing the Commission to accept the Secretary's conditions, the Ninth Circuit majority deprived the Commission of the opportunity to create its own solution to the problem of crafting a license which simultaneously serves the public interest and protects reservations. This means that the Ninth Circuit's decision will create problems not susceptible to judicial review, as the facts below illustrate.

Had the Commission's order below been reviewed on the merits, the first question would have been whether substantial evidence supported the Commission's finding that the license issued was not inconsistent with the purpose for which the

²⁹ See *Winters v. United States*, 207 U.S. 564 (1908).

relevant reservations were created or acquired. If the license passed this test, the court would proceed to evaluate the Commission's reasons for modifying or rejecting the Secretary's conditions, Pet. App. 147-55. The necessity of Interior's conditions would be evaluated with respect to the license as issued by FERC, including, *e.g.*, the Commission's innovative Article 29. If the Commission's treatment of Interior's conditions were held to be supported by findings based on substantial evidence, it would be upheld and the public interest would be served without harm to the reservations.

By contrast, review of a Commission license which included the Secretary's conditions would proceed very differently. First, the license itself would be very different, and would be less in accord with the Commission's determination of the public interest. Indeed, the Commission might well have licensed the project to the Bands rather than Escondido, or have been forced to do so upon Escondido's refusal to accept a new license containing Interior's conditions.³⁰ The necessity and propriety of the Secretary's conditions would not be judged with reference to the Commission's optimal license proposal, for that proposal would never have appeared. Pet. App. 147. Rather, the necessity and propriety of the Secretary's conditions would be judged with respect to the license proposals in the record, *i.e.*, the original applications plus any proposed modifications. Judged on this basis, Secretarial conditions inferior to those the Commission might have imposed if given a chance could well be upheld. In this way, an unconditional, unreviewable Secretarial veto is created which cuts off consideration of projects in the public interest.

³⁰ The Secretary's conditions necessarily dictate the broad outlines of the ultimate license. This is in essence a usurpation of the Commission's powers.

III. THE NINTH CIRCUIT'S HOLDING THAT WATER RIGHTS APPURTENANT TO RESERVATIONS OUTSIDE PROJECT BOUNDARIES ARE "RESERVATIONS" UNDER THE ACT IS A MISTAKEN AND UNNECESSARY INTERPRETATION

A. The Provisions Of Part I Of The Act Do Not Support The Ninth Circuit's Interpretation That "Reservations" Include Water Rights

The Ninth Circuit held that FERC was required to adopt Interior's conditions with respect to all six Indian reservations, even though the project works are not located on three of them, because water rights allegedly appurtenant to those reservations might be affected by the project. Pet. App. 25. The court reached this result, notwithstanding the fact that the first proviso of FPA § 4(e) is expressly applicable only to licenses "within" reservations, on the ground, apparently, that the implied reservation of water rights under *Winters v. United States*, 207 U.S. 564 (1908), constitutes a "reservation" within the meaning of the Act. This interpretation is strained because it conflicts with the Act's language and is unnecessary because Indian water rights are otherwise protected through judicial resolution.

Section 4(e) authorizes the construction, operation and maintenance of "project works . . . upon any part of . . . reservations of the United States" and states that "licenses . . . issued *within* any reservation" are subject to the Secretarial authority at bar. (emphasis added) Section 3(2) defines "reservations" to include "tribal lands embraced *within* Indian reservations." (emphasis added) "Project works" do not include water rights. FPA § 3(12), 16 U.S.C. § 796(12).

That language, as the Ninth Circuit acknowledged, "tends to paint a geographical picture in the mind of the reader," Pet. App. 26; that is, § 4(e) speaks to those reservations in which the licensed project works are *physically* constructed, operated or maintained. The Commission so found, Pet. App. 330-332, and its construction of the Act is entitled to deference.

Nevertheless, the court construes § 4(e) as if it were directed to reservations which "may be affected by the project," Pet. App. 25, rather than to licenses issued within reservations as the Act provides.

The court's strained reading is without basis. The court reasons that water rights are "reservations" under the Act because water rights are interests in land and because § 3(2) defines "reservations" to include

tribal lands embraced within Indian reservations . . . and other lands and interests in lands . . .

Pet. App. 25-26. But Congress could not have had water rights in mind when it referred to "interests in lands." Logically, tribal lands are not "embraced within" water rights. Furthermore, § 3(11) of the Act, in defining "project," lists "water rights" separately from "interest in lands," indicating that for purposes of the Act the former was not included within the latter.³¹

The Ninth Circuit's strained reading of § 3(2) leads it to conclude the language of § 4(e) is ambiguous. The court resolves the ambiguity in favor of the Indians because it claims that the ambiguity is in a statutory clause passed for the "precise purpose" of benefitting dependent Indian tribes. Pet. App. 27. However, the first proviso of § 4(e) is addressed to the protection not just of Indian reservations but of *all* reservations as generally defined by the Act to include national forests, military reservations, "other lands and interests in lands owned by the United States and withdrawn . . . from private appropriation and disposal," and "lands and interests in lands acquired and held for any public purposes." Section 3(2). In that light, the language in question cannot fairly be said to be primarily for the benefit of Indian tribes," let alone for this "precise purpose."

³¹ The court's expansionist reading of "interests in lands" to embrace water rights is unmindful of the fact that the Act's definition of "reservations" was "artificial" and is not intended to correspond to the common meaning of that term. *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 111 (1960).

Indeed, the most direct impact of the Ninth Circuit's expansion of the definition of "reservations" is in the body of § 4(e), where it would impose upon the Commission the obligation to license projects far from navigable waters, public lands, or reservations whenever such projects might affect claims to water rights appurtenant to distant reservations. *See infra*. Even if the first proviso of FPA § 4(e) is seen as a provision for the protection of Indians, it stretches credibility to read "that precise purpose," Pet. App. 27, into the very definition of the Commission's licensing jurisdiction so as dramatically to expand that jurisdiction. The Ninth Circuit seems never to have considered the full impact of its construction.

In practical terms the Ninth Circuit's construction requires the Commission to issue licenses based upon findings relating to water rights which could be (as here) in dispute and unadjudicated.³² Interior would, of course, prefer to pursue the Indians' water rights claims in a FERC licensing proceeding where its conditions cannot be rejected, rather than in court. But there is no authority to adjudicate water rights in a FERC licensing proceeding. Pet. App. 99, 184; FPA § 27, 16 U.S.C. § 821; *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 175 (1946) Although the Commission requires, under FPA § 9(b), satisfactory evidence from an applicant that it has the right "to the appropriation, diversion, and use of water for power purposes . . .," protection of the right to "an allotment of water necessary to make the reservation livable," is a judicial function. *Arizona v. California*, 103 S.Ct. 1382, 1390 (1983)³³ Moreover, the Ninth Circuit's formulation, in which

³² Indeed, under the theory of the Ninth Circuit's ruling, Secretarial claims might well have been denied in state water adjudication proceedings, and nevertheless be binding on FERC if requested by the Interior or other departmental Secretary as a necessary condition in that forum. Interior so argued below. J.A. 177-78.

³³ Accordingly, the Commission has long and consistently held that it is not an appropriate forum for the resolution of water rights conflicts. *See, e.g., East Bay Municipal Utility District*, 1 F.P.C. 12, 13 (1932); *Seneca Nation of Indians*, 6 F.P.C. 1025, 1026 (1947); *Rumford Falls Power Co.*, 36 F.P.C. 605, 607 (1966); *Essex Co.*, 56 F.P.C. 977, 978 (1976); *Southern California Edison Co.*, 23

Interior serves the dual role of advocate and arbiter for the same tribal water rights claims, contravenes this Court's conclusion in *Arizona v. California*, 103 S.Ct. at 1400, 1402 n.28, that *ex parte*, unadjudicated Secretarial determinations of water rights issues should not be binding determinations.

There was no requirement for this strained and novel interpretation. The court below was well aware that the question of the right to the use of waters among the parties involved was in litigation in a United States District Court having jurisdiction over the controversy, and that the litigation had been ongoing since mid-1969. Pet. App. 7. FERC, recognizing that it has no jurisdiction to declare water rights, included within the license for the Escondido project a condition which would permit it to modify the license, as appropriate, to recognize the disposition of the water rights litigation. Pet. App. 259. This has been the Commission's consistent approach in licensing proceedings with underlying water rights controversies. See, e.g., *Southern California Edison Co.*, *supra*, 23 F.E.R.C. ¶ 61,240, pp. 61,514 and 61,519 (Article 33); *Pacific Gas & Electric Co.*, *supra*, 25 F.E.R.C. § 61,010, pp. 61,056 and 61,074 (Article 50). However, the Ninth Circuit's decision in effect would impose a Secretarial decision on water rights claims appurtenant to reservations in a new forum, that is, the FERC.

Courts should be circumspect about declaring interpretations that are unnecessary for the purposes of a particular case and that can only bring mischief in their further applications. Cf. *Barr v. Matteo*, 355 U.S. 171, 172 (1957). This is particularly true in the delicate area of water rights, which has always been of critical importance in the West and which are becoming increasingly significant throughout the Nation. The court below, in fashioning a construction of the statute to assist the Indian reservations downstream unfortunately overlooked the

F.E.R.C. ¶ 61,240, p. 61,511 (May 18, 1983), *reh'g denied*, 24 F.E.R.C. ¶ 61,119 (July 22, 1983); *Pacific Gas & Electric Co.*, 25 F.E.R.C. ¶ 61,010, pp. 61,056-57, 61,075 n.11 (Oct. 4, 1983).

fact that reservations are legion, and under the court's broad language may be argued as even more universal. Conditions might be imposed upon the Commission on behalf of a wilderness study area, a wild or scenic river study section, a fish and wildlife refuge or whatever other "reservation" a Secretary might assert to exist,³⁴ however far downstream it might be from the project involved. The extensive and necessarily interrelated properties of water, streams, tributaries, reservoirs, and rivers would give such a reading a virtually unlimited reach. Thus, it is not only straining unnecessarily to include implied reserved rights within the technical meaning of "reservation" under the Federal Power Act, but it exposes numerous existing licensees as well as pending license applicants to undefined, unknown obligations against their projects which are totally unwarranted.

While there, of course, must be concern to protect Indian entitlements fully, this must not be to the exclusion of all other rights and obligations which might be involved. Certainly, an additional new forum is not needed in light of the holdings of this Court during the past term in *Arizona v. California*, *supra*, *Nevada v. United States*, 103 S.Ct. 2906 (1983), and *Arizona v. San Carlos Apache Tribe* (the McCarran Act cases), 103 S.Ct. 3201 (1983), which gave recognition to the protection of such rights in the context of the water rights of all who might be involved.

B. The Court's Construction Of "Reservations" Is Inconsistent With The FPA As It Impermissibly Expands Both The Secretariat And FERC's Jurisdiction

If the Ninth Circuit's construction of the term "reservations" as embracing water rights is upheld, the Commission's licensing authority will be expanded dramatically. Federal reservations may carry with them implied reservations of such water supplies as are necessary for their purposes. Virtually

³⁴ See *Pacific Gas & Electric Co.*, *supra*, 25 F.E.R.C. ¶ 61,010, where Indian tribes asserted the need for water to support a fishery adequate to maintain alleged fishing rights.

no hydro project in the Western United States fails to affect water flows into one or more federal reservations. All of these projects will be "upon any part of . . . reservations of the United States," and will therefore require Commission licenses. FPA §§ 4(e), 23(b). When combined with the holding that the Commission has no power to modify or reject Secretarial conditions for the protection of reservations, this expansion of opportunity for Secretarial "participation" is a recipe for disaster, particularly when more than one Secretary dictates immutable conditions.³⁵ It is no exaggeration to say that the combined impact of these two aspects of the Ninth Circuit's decision threatens to preclude much future hydro development in this country, and to freeze present hydro projects in a less than satisfactory state.³⁶ The ability of a Secretary to deadlock and manipulate the licensing process by means of his conditions, examined *supra*, will discourage many license applicants from proceeding in the face of departmental opposition.

CONCLUSION

The Ninth Circuit made two errors in its construction of the first proviso of Section 4(e) of the Federal Power Act. Each error will, if allowed to stand, have severe detrimental impact on the Commission's ability to fashion licenses in the public

³⁵ Cf. *Pacific Gas & Electric Co.*, 6 F.P.C. 729 (1947), where the Commission was forced to reject conditions of the Secretary of Agriculture and the California Fish and Game Division for fish protection within national forests because the conditions were inconsistent. The Commission would lose its ability to mediate under these circumstances if the Ninth Circuit is upheld.

³⁶ As noted *supra*, if a stalemate prevents the Commission from issuing a new license for an existing project, then the Commission must continue to issue annual licenses to the prior licensee. *Lac Courte Oreilles Band v. FPC*, 510 F.2d 198 (D.C. Cir. 1975); FPA § 15(a), 16 U.S.C. § 808(a). Because license terms cannot be altered in an annual license, modifications in the public interest could not be made while the stalemate continued.

interest, without in any way advancing the interests of protecting tribal lands embraced within Indian reservations. The decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ESCONDIDO MUTUAL WATER COMPANY, *et al.*,
Petitioners

v.

LAJOLLA, RINCON, SAN PASQUAL, PAUMA AND
PALA BANDS OF MISSION INDIANS, *et al.*,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE
EDISON ELECTRIC INSTITUTE

IN SUPPORT OF REVERSAL

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TABLE OF CONTENTS

	Page
I. INTEREST OF AMICUS CURIAE	1
II. SUMMARY OF ARGUMENT	3
III. ARGUMENT	4
A. The Court Of Appeals' Construction Of Section 4(e)'s Reservations Proviso Is Erroneous	4
1. The Court's Decision Defeats The Statutory Plan Congress Envisioned	4
a. The Commission Is The Final Administrative Authority Under Section 4(e)	5
b. Other FPA Provisions Support This Interpretation	8
2. Legislative History Confirms The Commission's Paramount Section 4(e) Authority	9
3. The Court Of Appeals' Interpretation Of Section 4(e) Makes Judicial Review Unworkable And Is In Conflict With The District Of Columbia Circuit's Treatment Of A Parallel FPA Provision	12
B. In No Event Does Section 4(e) Apply In Relicensing Cases Under The Federal Power Act	15
1. Section 4(e) Applies Only To Initial Licensing	15
2. FPA Section 15 Governs Relicensing	16
C. Where There Are No Project Works Within A Reservation, Section 4(e)'s Reservations Proviso Does Not Apply	20

TABLE OF CONTENTS—Continued

	Page
1. The Reservations Proviso Applies Only To Projects That Occupy Reservation Lands	20
2. The Court Of Appeals' Extended Definition Of Reservation Is Unnecessary.....	22
3. Enlarging The Application Of The Reservations Proviso Would Inject Unnecessary Complications And Uncertainty Into The Licensing Process	23
IV. CONCLUSION	25

iii

TABLE OF AUTHORITIES

CASES:	Page
<i>Alaska Pacific Fisheries v. United States</i> , 248 U.S. 78 (1918)	24
<i>Chemehuevi Tribe of Indians v. FPC</i> , 420 U.S. 395 (1975)	4, 5, 10, 11
<i>Chicago & S. Air Lines v. Waterman S.S. Corp.</i> , 333 U.S. 103 (1948)	15
<i>Escondido Mutual Water Co. v. FERC</i> , 692 F.2d 1223 (1982), modified on denial of reh'g, 701 F.2d 826 (9th Cir. 1983)	1
<i>Escondido Mutual Water Co.</i> , 6 F.E.R.C. ¶ 63,008 (CCH 1977) (Initial Decision of Administrative Law Judge)	2
<i>First Iowa Hydro-Electric Cooperative v. FPC</i> , 328 U.S. 152 (1946)	5, 8
<i>FPC v. Idaho Power Co.</i> , 344 U.S. 17 (1952)	7
<i>FPC v. Louisiana Power & Light Co.</i> , 406 U.S. 621 (1972)	16
<i>FPC v. Tuscarora Indian Nation</i> , 362 U.S. 99 (1960)	8, 20
<i>FPC v. Union Electric Co.</i> , 381 U.S. 90 (1965)	8
<i>Lac Courte Oreilles Band v. FPC</i> , 510 F.2d 198 (D.C. Cir. 1975)	17
<i>Montana Power Co. v. FPC</i> , 459 F.2d 863 (D.C. Cir. 1972), cert. denied, 408 U.S. 930 (1972)	14, 15
<i>Pacific Gas and Electric Co.</i> , 53 F.P.C. 523 (1975) ..	12
<i>Pacific Gas and Electric Co.</i> , 6 F.P.C. 729 (1947)	12
<i>Pigeon River Lumber Co.</i> , 1 F.P.C. 206 (1935)	12
<i>Richards v. United States</i> , 369 U.S. 1 (1962)	4
<i>Scenic Hudson Preservation Conference v. FPC</i> , 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966)	22
<i>Seminole Nation v. United States</i> , 316 U.S. 286 (1942)	14
<i>Texas & Pac. Ry. v. Abilene Cotton Oil Co.</i> , 204 U.S. 426 (1907)	14
<i>Udall v. FPC</i> , 387 U.S. 428 (1967)	22, 23
<i>United States ex rel. Chapman v. FPC</i> , 345 U.S. 153 (1953)	8
<i>United States v. New Mexico</i> , 438 U.S. 696 (1978) ..	24
<i>United States v. Winans</i> , 198 U.S. 371 (1905)	24

TABLE OF AUTHORITIES—Continued

STATUTES:	Page
16 U.S.C. § 1 <i>et seq.</i>	20
16 U.S.C. § 45(c) (1926)	21
16 U.S.C. § 47(b) (1926)	21
16 U.S.C. § 471 <i>et seq.</i>	20
Federal Water Power Act of 1920, 41 Stat. 1063, reenacted as Federal Power Act, 16 U.S.C. § 791a <i>et seq.</i> :	
Section 3(2), 16 U.S.C. § 796(2)	6, 20, 21
Section 3(11), 16 U.S.C. § 796(11)	21
Section 4(e), 16 U.S.C. § 797(e)	<i>passim</i>
Section 6, 16 U.S.C. § 799	6, 7, 24
Section 8, 16 U.S.C. § 801	7
Section 9, 16 U.S.C. § 802	7
Section 10(a), 16 U.S.C. § 803(a)	6, 7, 22, 23
Section 10(e), 16 U.S.C. § 803(e)	7, 14
Section 10(g), 16 U.S.C. § 803(g)	7, 24
Section 13, 16 U.S.C. § 806	7
Section 14(b), 16 U.S.C. § 807(b)	7, 16
Section 15(a), 16 U.S.C. § 808(a)	<i>passim</i>
Section 16, 16 U.S.C. § 809	7
Section 18, 16 U.S.C. § 811	7, 8, 9
Section 19, 16 U.S.C. § 812	7
Section 20, 16 U.S.C. § 813	7
Section 26, 16 U.S.C. § 820	7
Section 27, 16 U.S.C. § 821	21
Section 313(b), 16 U.S.C. 825l(b)	12, 13
16 U.S.C. § 1132	20
Wild and Scenic Rivers Act, October 2, 1968, 16 U.S.C. § 1271 <i>et seq.</i>	22
16 U.S.C. § 1274	20
Rivers and Harbors Act of 1899, 33 U.S.C. § 401..	5
Mission Indian Relief Act, January 12, 1891, 26 Stat. 712	3
Act of February 1, 1905, 33 Stat. 628	5
Act of June 23, 1910, 36 Stat. 593	5
Act of March 3, 1921, 41 Stat. 1353	10, 21
Act of June 23, 1930, 46 Stat. 797	10

TABLE OF AUTHORITIES—Continued

LEGISLATIVE HISTORY:	Page
H.R. Rep. No. 61, 66th Cong., 1st Sess. (1919).....	6
H.R. Rep. No. 1299, 66th Cong., 3d Sess. (1921)....	10
H.R. Rep. No. 1318, 74th Cong., 1st Sess. (1935).. <i>Hearings Before the House Water Power Commit-</i> <i>tee, 65th Cong., 2d Sess. (1918)</i>	9 19
<i>Federal Power Commission: Hearings on H.R.</i> <i>11408 Before the House Comm. on Interstate</i> <i>and Foreign Commerce, 71st Cong., 2d Sess.</i> <i>(1930)</i>	11
<i>Hearings Before House Interstate and Foreign</i> <i>Commerce Committee on H.R. 5423; Feb. 19-</i> <i>28, Mar. 1-13, 1935, 74th Cong., 1st Sess.</i> <i>(1935)</i>	9
<i>Hearings on H.R. 12698, 12699 Before the House</i> <i>Comm. on Interstate and Foreign Commerce,</i> <i>90th Cong., 2d Sess. (1968)</i>	18
S. Rep. No. 180, 66th Cong., 1st Sess. (1919).....	6, 18, 19
<i>Investigation of Federal Regulation of Power:</i> <i>Hearings Before the Senate Comm. on Interstate</i> <i>Commerce Pursuant to S. Res. 80 and on S.</i> <i>3619, 71st Cong., 2d Sess. (1930)</i>	13-14
59 Cong. Rec. 1049 (1920)	25
59 Cong. Rec. 6527 (May 4, 1920)	7
MISCELLANEOUS:	
2A C. Sands, <i>Sutherland Statutory Construction</i> (1973)	13
1 R. Clark, <i>Waters and Water Rights</i> (1967).....	21
J. Kerwin, <i>Federal Water-Power Legislation</i> (1926)	5

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2056

ESCONDIDO MUTUAL WATER COMPANY, *et al.*,
Petitioners
v.

LAJOLLA, RINCON, SAN PASQUAL, PAUMA AND
PALA BANDS OF MISSION INDIANS, *et al.*,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**BRIEF OF AMICUS CURIAE
EDISON ELECTRIC INSTITUTE**

Edison Electric Institute ("EEI") submits its brief *amicus curiae* in support of petitioners Escondido Mutual Water Company, City of Escondido and Vista Irrigation District. Petitioners ask the Court to reverse the decision by the United States Court of Appeals for the Ninth Circuit in *Escondido Mutual Water Co. v. FERC*, 692 F.2d 1223 (1982), *modified on denial of reh'g*, 701 F.2d 826 (1983). Pursuant to Rule 36.2 of the Court's rules, EEI has obtained the written consent of all parties to the filing of this brief. The consents have been filed with the Clerk of the Court.

I. INTEREST OF AMICUS CURIAE

EEI is the national association of electric utility companies. EEI's members generate 76 percent of the United States' electric energy and serve more than 77 percent of the nation's electric consumers.

This case has considerable importance to EEI member companies. As of December 1, 1983, 65 EEI member companies held 354 licenses issued by the Federal Energy Regulatory Commission for hydroelectric projects under the Federal Power Act, 16 U.S.C. § 791a *et seq.*¹ A number of these projects are located on federal reservations, including Indian lands and national forests. The Court of Appeals held that whenever a federal reservation *may be affected* by a project, Section 4(e) of the Act, 16 U.S.C. § 797(e), requires the Commission to impose in the license whatever conditions the responsible departmental Secretary *unilaterally* deems "necessary for the adequate protection and utilization of" the reservation.

The Court of Appeals' decision has serious adverse implications for those members of EEI who have invested capital in these hydroelectric projects as well as for nearly all of the other members who, from time to time, share in the benefits of inexpensive water power as a result of the interconnected transmission grid. In the proceedings below the Commission's administrative law judge concluded that the Secretary of Interior's unilateral conditions were "designed . . . to destroy" a project which had been in existence for many years. *See* Joint Appendix at 300; 6 F.E.R.C. ¶ 63,008 at 65,074-75 (CCH 1977). If the Commission is forced to adopt such conditions without any opportunity for consideration or modification in the light of broad public interest in the use of the nation's hydroelectric resources, then the future availability of a considerable portion of those hydroelectric resources will be jeopardized. In addition, EEI is concerned that the decision below could be wrongly construed to apply to relicensing as well as to the initial licensing context of this case. Such an interpretation would be inconsistent with the Act and would lead to

¹ The agency is referred to below as the "Commission" or "FERC." The Federal Power Act is referred to as "the Act" or "FPA."

substantial uncertainty and litigation when many of the member companies' licenses expire.

II. SUMMARY OF ARGUMENT

This Court should reverse the decision of the Court of Appeals.² The Federal Power Act as interpreted by this Court places in the Commission comprehensive licensing jurisdiction over hydroelectric projects. As this Court has emphasized, Congress chose the Commission as the agency to control hydroelectric licensing. It is the Commission, therefore, which must make the ultimate administrative determination as to those license conditions which are required by Section 4(e) of the Act "for the adequate protection and utilization of" federal reservations. The Court of Appeals' interpretation of Section 4(e), on the other hand, strips the Commission of that responsibility and resurrects the fragmented pattern of regulation that the Federal Power Act was intended to change. Moreover, aside from its inconsistency with this Court's decisions, the Court of Appeals' decision conflicts with a decision of another circuit court construing related provisions of the Federal Power Act.

The Court of Appeals also erred in extending Section 4(e) far beyond its intended purpose. Contrary to that court's interpretation of the statute, projects located outside of a federal reservation but which affect or might in the future affect reserved water rights of a federal reservation are not "within any reservation" within the meaning of Section 4(e) of the Act.

² EEI believes the Court of Appeals wrongly decided each of the three questions presented in the Petition for a Writ of Certiorari. EEI, however, is not briefing the question which relates to the Mission Indian Relief Act, the Act of January 12, 1891, 26 Stat. 712.

III. ARGUMENT

A. The Court Of Appeals' Construction Of Section 4(e)'s Reservations Provisio Is Erroneous

1. *The Court's Decision Defeats The Statutory Plan Congress Envisioned*

The proviso of FPA Section 4(e) at issue here reads:

[L]icenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

The Court of Appeals said that the words "shall be subject to and contain such conditions" make the departmental Secretaries' proposed conditions obligatory on FERC. The court concluded that the "plain meaning rule" requires this result even where the Commission finds a proposed condition infeasible or unnecessary.

The "plain meaning" rule does not require this. Rather, as this Court has explained, it is

fundamental that a section of a statute should not be read in isolation from the context of the whole act, and that in fulfilling [the Court's] responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy."

Richards v. United States, 369 U.S. 1, 11 (1962) (footnotes omitted). Indeed, this was the same approach the Court followed in *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395 (1975). Like this case, *Chemehuevi* also involved interpretation of FPA Section 4(e). And despite a "plain meaning" argument that was not without

some persuasive force, the Court said the argument "is refuted when § 4(e) is read together with the rest of the Act, as, of course, it must be." *Id.* at 403. That is precisely the case here as well.

a. *The Commission Is The Final Administrative Authority Under Section 4(e)*

Prior to 1920, hydroelectric licensing responsibility was scattered among three executive departments—Agriculture, Interior and War. Each department operated autonomously and their separate interests dictated hydroelectric licensing policy.³ The result of this fragmented regime was to discourage the private investment necessary to develop water power resources. See *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 180 (1946).

Congress' solution was to establish a single agency charged with balancing the various public interest considerations in the licensing of hydroelectric projects. The Federal Water Power Act of 1920, 41 Stat. 1063,⁴ lodged all water power licensing authority in a single agency composed of the Secretaries of Agriculture, Interior and War. Congressman Lee, a member of the Conference Committee that reported the bill that became the 1920 Act, summarized the statute's central purpose:

Under the provisions of the bill now agreed upon, all water powers over which the United States has

³ Prior to the adoption of the Federal Water Power Act, licensing authority was vested in three separate agencies: the Secretary of War had authority under the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 and 403, and the Act of June 23, 1910 (36 Stat. 598); the Secretary of Agriculture had authority over certain hydroelectric projects under the Act of February 1, 1905 (33 Stat. 628); and the Secretary of Interior had authority over projects built on lands under his control, J. Kerwin, *Federal Water-Power Legislation* 105-114 (1926).

⁴ The Federal Water Power Act was reenacted in 1935, with various modifications not relevant here, as Part I of the Federal Power Act. See 49 Stat. 838.

any jurisdiction will hereinafter be administered by a commission composed of the Secretaries of War, Interior and Agriculture, a measure by which duplication of work may be avoided, *a common policy pursued and the combined efforts of the three Departments directed toward a constructive National program* of intelligent economical utilization of our water-power resources.

59 Cong. Rec. 6527 (May 4, 1920).⁵

Under Section 4(e) of the 1920 Act the Commission alone is authorized to issue licenses for power projects on streams over which Congress has jurisdiction and "upon any part of the public lands and reservations of the United States."⁶ In issuing initial licenses, Section 4(e) requires the Commission itself to find that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." Similarly, Section 10(a), 16 U.S.C. § 803(a), requires licenses to reflect "the judgment of the Commission" as to the terms and conditions necessary for a project to be "best adapted to a comprehensive plan for improving or developing a waterway or waterways."

The Commission's paramount authority to exercise its judgment in implementing the Act's standards is further underscored by FPA Section 6, 12 U.S.C. § 799. It provides that each license

⁵ Emphasis is supplied throughout this brief. See also S. Rep. No. 180, 66th Cong., 1st Sess. (1919) and H.R. Rep. No. 61, 66th Cong., 1st Sess. (1919).

⁶ FPA § 3(2) defines "reservations" as:

national forest, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks.

shall be conditioned upon acceptance by the licensee of all the *terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter.*

As this language makes clear, licenses contain two categories of conditions—those automatically imposed on a licensee by various FPA provisions and those “the Commission shall prescribe.” Unlike other portions of the Act,⁷ however, the Section 4(e) reservations proviso contains no automatic or self-implementing “terms and conditions.” Rather, conditions which a departmental Secretary considers necessary under Section 4(e) fall into the secondary category—those which “the Commission shall prescribe.”

The fundamental statutory plan is to make the Commission the final administrative authority with respect to all license conditions. To be sure, the Commission must give careful consideration to a departmental Secretary's position regarding the Section 4(e) conditions a license shall “be subject to and contain.” If the Commission, in light of each of the public interest considerations contained in the Act, finds a Secretary's conditions necessary “for the adequate protection and utilization of” the reservation, the Commission must include them in the license. One agency, however, must have the final administrative word on this point. This is because the power to condition is tantamount to the power to approve or deny a license. And “[i]t is the Commission's judgment on which Congress has placed its reliance for control of licenses.” *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).

The selection of the Commission rather than the departmental Secretary as the final administrative authority goes to the heart of Congress' intent in enacting the

⁷ The following sections of the Act, for example, contain provisions which automatically become conditions in every major license (1500 kilowatts or larger) issued by the Commission: §§ 6, 8-10, 13-16, 18-20 and 26, 16 U.S.C. §§ 799, 801-03, 806-09, 811-13 and 820.

Federal Water Power Act in 1920. Congress wanted to end the fragmented approach of the past in which each department's parochial interests controlled licensing. Indeed, as this Court has explained, the FPA was intended as

a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, *instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts, and other federal laws previously enacted.*^{*}

First Iowa Hydro-Electric Cooperative, supra at 180.^{*}

b. *Other FPA Provisions Support This Interpretation*

Another portion of Section 4(e) bars the Commission from issuing any license affecting navigable waters "until the plans of the dam . . . have been approved by the Chief of Engineers and the Secretary of the Army." If Congress had intended that the Section 4(e) conditions of the appropriate departmental Secretary would have the force and effect ascribed to them by the Court of Appeals, then it makes no sense for the Congress not to have given those Secretaries the same approval powers it gave to the Secretary of the Army later in the same section of the Act.

The power to impose license conditions for the "protection and utilization" of a reservation is tantamount to the power to approve or disapprove a project. In Section 4(e) Congress stopped considerably short of granting such approval power to the departmental Secretaries in the case of projects to be located within a reservation. Similarly, in FPA Section 18, 16 U.S.C. § 811, Congress also stopped considerably short of granting various de-

^{*} See also *FPC v. Union Electric Co.*, 381 U.S. 90, 98 (1965); *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960); and *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 167-72 (1953).

partment heads the power to condition licenses. The department heads identified in Section 18 are permitted to prescribe the construction, operation and maintenance of "lights and signals" and "fishways." But the fashioning of license conditions with respect to those items is left to the Commission, not to the department heads identified in the statute.⁹

2. Legislative History Confirms The Commission's Paramount Section 4(e) Authority

The FPA's legislative history demonstrates that the FERC was intended to have paramount authority in determining a licensed project's consistency with the purpose of the federal reservation.

As adopted in 1920, the Federal Water Power Act authorized the Commission to license hydroelectric projects on all federal reservations under the Secretary of Interior's responsibility—national parks and monuments, Indian lands, etc. Section 4(e)'s reservations proviso was just as much a part of the statute then as it is now. Nevertheless, Secretary of Interior Payne, the incumbent in 1920, objected to the fact that national parks and

⁹ Section 18 directs the Commission to require the construction of such lights and signals as the Secretary of Transportation shall direct and such fishways as the Secretary of Commerce shall prescribe. This provision was not part of the original 1920 Water Power Act, and was added to the Act in 1935 at the suggestion of the Commission. See *Hearings Before the House Interstate and Foreign Commerce Committee on H.R. 5423; Feb. 19-28, Mar. 1-13, 1935*, 74th Cong., 1st Sess. 388-391 (1935). As enacted in 1920, § 18 only obligated licensees to comply with rules and regulations of the Secretary of War respecting, *inter alia*, the "maintenance and operation" of "such fishways as may be prescribed by the Secretary of Commerce." 41 Stat. 1073. In its report on the bill which enacted Part I of the Federal Power Act the House Committee on Interstate and Foreign Commerce said the amendment to § 18 "empowers the Commission to require a licensee to construct as well as maintain" such fishways as are prescribed. H.R. Rep. No. 1818, 74th Cong., 1st Sess. 25 (1935).

monuments had been made subject to the Commission's licensing jurisdiction. Secretary Payne advocated an amendment to remove those reservations from the statutes. Although the 1920 Act was adopted without this amendment, it was understood that the following session of Congress would remove parks and monuments from the Commission's licensing authority. A 1921 amendment did just that.¹⁰ Under the Court of Appeals' interpretation of Section 4(e), however, the amendment would have been unnecessary. That is because the Commission's Section 4(e) finding would already have been subordinate to mandatory secretarial conditions.

Later, in 1930, the Commission was reorganized as an agency of five independent commissioners. See 46 Stat. 797; *Chemehuevi*, *supra*, at 410 n.15. During Senate hearings on the reorganization various witnesses testified regarding potential conflict between the Commission's authority and that of the three departments having responsibility over federal reservations. See *Investigation of Federal Regulation of Power: Hearings Before the Senate Comm. on Interstate Commerce Pursuant to S. Res. 80 and on S. 3619*, 71st Cong., 2d Sess. (1930).

One of the witnesses addressing this point was O.C. Merrill, a principal draftsman of the Federal Water

¹⁰ See 41 Stat. 1353. The House of Representatives Committee on Public Lands' report on this amendment explains that several days before President Wilson signed the 1920 Act, Secretary Payne

called attention to the fact that the language of Section 4 . . . [then 4(d), now 4(e)] placed the national parks and monuments at the disposition of the Federal Power Commission and that, in his opinion, this ought not to be done; that the jurisdiction over parks and monuments should be retained by Congress, and he so advised the President on June 4, 1920. Owing to the great demand for the legislation . . . an understanding was arrived at to the effect that bills should be introduced at the present session amending the Federal Water Power Act so as to eliminate from its provisions national parks and monuments. The pending bill carries out this understanding.

H.R. Rep. No. 1299, 66th Cong., 3d Sess. 2 (1921).

Power Act (*see Chemehuevi, supra*, at 418 n.24) and the Commission's first executive secretary. Referring to past instances of conflict between the Commission as such and a departmental Secretary who was also a member of the Commission, Mr. Merrill said "[i]t came up at times while I was in the commission, and we took the position that the commission's decision was final." *See Investigation of Federal Regulation of Power, supra*, at 281. Addressing the same point, Mr. Merrill had also explained:

In my opinion the best way to maintain the jurisdiction and interests of three departments [under an independent commission] is to have the field work in so far as it relates to the issuance of licenses, originally handled as it has been ever since I have been with the Federal Power Commission, through the departments, *leaving the final decision to the Federal Power Commission. But the three departments have no final say in those matters.*

Id. at 280.

Later in the same hearings the FPC's Acting Chief Counsel, James F. Lawson, further emphasized this point. Mr. Lawson explained that "[t]he Commission now has power to override the head of a department as to the consistency of a license with the purpose of any reservation." *Id.* at 358. An interpretation of Section 4(e) that permits the Commission to override a department concerning the Section 4(e) consistency finding but allows the department to impose conditions on a licensee making the project infeasible would be nonsensical.

This legislative history plainly shows that where the views of the Commission and a departmental Secretary conflict regarding Section 4(e) conditions, the Commission's view takes priority.¹¹ And that position is con-

¹¹ The same theme was repeated in the House of Representatives' hearings in connection with the Commission's 1930 reorganization. *See Federal Power Commission: Hearings on H.R. 11408 Before the House Comm. on Interstate and Foreign Commerce, 71st Cong., 2d*

firmed by Commission decisions involving these conflicts.¹²

3. *The Court Of Appeals' Interpretation Of Section 4(e) Makes Judicial Review Unworkable And Is In Conflict With The District Of Columbia Circuit's Treatment Of A Parallel FPA Provision*

The Court of Appeals' initial opinion relied on two factors to conclude that there would be effective judicial review of Section 4(e) secretarial conditions. The first was that "any license issued by the Commission which includes conditions propounded by Interior will be subject to review under section 313(b) of the FPA, 16 U.S.C. 825l(b)." *See* Pet. App. at 24. In addition, the court said secretarial conditions under "section 4(e) will be reviewable as a final agency action under the applicable provisions of the Administrative Procedures (sic) Act, 5 U.S.C. §§ 701-706." *Id.* at 24-25. On rehearing the court withdrew the second point, recognizing that APA review of the Secretary's conditions was not an available remedy. *See id.* at 32-33.

Seas. (1930). The Secretaries of Agriculture and Interior (Messrs. Hyde and Wilbur, respectively) each addressed this question of conflicting authority under FPA § 4(e). Each indicated that in the case of conflict with one of the departments, the Commission's authority was paramount. *See id.* at 45-46, 48.

¹² *See Pacific Gas & Electric Co.*, 53 F.P.C. 523, 526 (1975) (while Commission gives great weight to conditions offered by the Secretary of Agriculture under FPA § 4(e) in connection with project's use of national forest, terms of license must be based on Commission's judgment and the record); *Pacific Gas & Electric Co.*, 6 F.P.C. 729, 730 (1947) ("the Commission may . . . prescribe reasonable conditions for the protection and support of fish life" in a national forest after considering those "recommended" by the Secretary of Agriculture, Secretary of Interior and State of California); *Pigeon River Lumber Co.*, 1 F.P.C. 206, 209 (1935) (in a case involving Indian lands the Commission "will give great weight to the judgment and recommendation" of the Secretary of Interior but § 4(d) [now § 4(e)] gives the Commission "the sole power and duty" to find, based on the record before it, that the license will be consistent with the reservation's purpose).

The Court of Appeals' plan for judicial review will be cumbersome and prolonged, at best. In the typical case a Secretary's Section 4(e) conditions are presented to the FERC by letter. There is no record or findings to support the conditions. In the past when FERC either adopted or rejected a proposed condition, the agency was obligated under FPA Section 313(b) to support its action with substantial evidence and reasoned findings. Obviously, however, the Commission cannot be expected to present evidence or findings to support a condition with which it disagrees.

The dissenter from the Court of Appeals' decision, Judge Anderson, recognized this dilemma. *See* Pet. App. at 39-41. Noting that secretarial conditions must meet a "reasonableness" standard, Judge Anderson explained:

I would place the initial reasonableness decision on FERC, for it is, after all, the forum in which the initial factfinding function is vested. FPA § 4, 16 U.S.C. § 797. * * * FERC's written findings of fact and supporting reasoning would then be subject to review in the court of appeals. I believe this procedure would preserve the control of FERC over licensing, and at the same time respect the Secretary's statutory duty to protect the reservations.

Id. at 41.

Judge Anderson's solution is the same one that the Commission has followed for more than 60 years. Aside from its consistency with Section 313(b)'s plan for judicial review, that approach is also the one that best implements the overall scheme of the FPA.¹³ It allows re-

¹³ As discussed earlier, the Court of Appeals majority rejected this interpretation on the ground that § 4(e) secretarial conditions are mandatory for the FERC. *But see* 2A C. Sands, *Sutherland Statutory Construction* 417 (1973) ("It can be stated as a general proposition that, as regards the question of mandatory or directory operation, the courts will apply that construction which best carries into effect the purpose of the statute under consideration.") (footnote omitted).

viewing courts to have the full benefit of the Commission's expertise regarding the conditions that are necessary to make the project consistent with the purpose for which the reservation was established.¹⁴ The Court of Appeals majority, in contrast, renders meaningless the Commission's express duty to make the required consistency finding.

But aside from the Commission's expertise, it is charged with balancing various public interest considerations which, of course, would include the United States' fiduciary responsibility to Indian tribes. FERC's licensing obligation requires it to focus on each of the various FPA standards discussed earlier. The Secretary of Interior, on the other hand, is a trustee for Indian reservations and is held to "the most exacting fiduciary standards." See *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). In fashioning conditions for the protection of a reservation the Secretary can hardly be expected to proceed as an impartial decision maker. On the other hand, because the Commission must be objective, it is in the best position to make the final administrative reasonableness determination regarding proposed conditions.

Finally, the Court of Appeals' decision directly conflicts with the reasoning and decision of the United States Court of Appeals for the District of Columbia Circuit in *Montana Power Co. v. FPC*, 459 F.2d 863 (D.C. Cir.), cert. denied, 408 U.S. 930 (1972). The issue in *Montana Power* centered on the appropriate interpretation of FPA Section 10(e), 16 U.S.C. § 803(e). That statute authorizes the Commission to impose annual charges on project licensees where the project uses government-owned facilities or tribal lands within Indian reservations. The statute also provides that the Commission's determination shall be "subject to the approval of the Secretary of In-

¹⁴ Thus, Judge Anderson's solution is also consistent with the rationale underlying the primary jurisdiction doctrine. See *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

terior . . . and the Indian tribe having jurisdiction." But the court ruled that the quoted provision did *not* make the Commission's determination of annual charges subordinate to the views of the Secretary or Indian tribe. See 459 F.2d at 873-74. The court explained:

Considering the applicable statutes together [the Secretary] may approve a rental offered by the [licensee], and he may negotiate for an approved consensual arrangement; but if there is no agreement and the matter goes to the Commission, *the Secretary can refuse to approve the rate fixed by the Commission only by seeking court review* of its determination. As is the situation with the Tribes, the Secretary can participate as a party and avail of the provisions for judicial review.

Id. at 874. The Court of Appeals' inconsistent interpretation of Section 4(e)'s parallel provision is erroneous.¹⁵

B. In No Event Does Section 4(e) Apply In Relicensing Cases Under The Federal Power Act

1. Section 4(e) Applies Only To Initial Licensing

The FPA's requirements for *initial* licenses are quite different from those that apply to *relicensing* after a

¹⁵ Under the Court of Appeals' ruling it may be impossible to separate conditions authored by FERC from those authored by a departmental Secretary for judicial review purposes. For example, conditions initially authored by FERC may cause a departmental Secretary to propose certain § 4(e) conditions that he had not previously considered, and to omit conditions that originally he had intended. In a case involving an international air transportation route the conceptual impossibility of segregating the portions of the disputed order for which the Civil Aeronautics Board ("CAB") was responsible and those upon which the President had relied in giving his approval led this Court to hold that no part of the order could be ascribed to the CAB and, therefore, no part of the order was subject to judicial review. See *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). While there is no dispute in this case that all § 4(e) conditions are subject to judicial review, the Court of Appeals' decision will undoubtedly complicate and prolong the process.

project's original license—typically 50 years—has expired. Putting aside the issue of Section 4(e)'s interpretation (see argument A, *supra*), there is no dispute that Section 4(e) applies to *initial* licensing. Nor is there any issue before the Court regarding FERC's determination that this proceeding was to be treated as initial rather than relicensing. See Pet. App. at 133-37.¹⁶ The question of whether Section 4(e) applies to relicensing is not, accordingly, a necessary consideration in this case (and, in any event, should first be addressed by the FERC).¹⁷ Nevertheless, it is apparent from examination of the FPA's statutory plan, as explained below, that Section 4(e) does *not* apply to relicensing. It is important, therefore, that the Court's decision make clear that it applies only to the initial licensing at issue here.

2. FPA Section 15 Governs Relicensing

Initial licenses are governed by FPA Section 4(e). Under that statute the Commission issues initial licenses "for the purpose of constructing, operating, and maintaining" hydroelectric projects. Section 4(e)'s terms clearly contemplate the issuance of a license to construct new project works, as well as to operate and maintain them thereafter, not the issuance of a new license to replace the initial license.

FPA Section 15(a), 16 U.S.C. § 808(a), on the other hand, applies to relicensing. In fact, FPA Section 14(b), 16 U.S.C. § 807(b), directs the Commission to entertain applications for new licenses and agency proposals for

¹⁶ It is not altogether clear that this is an initial licensing case. The physical facilities being licensed here were already in existence. The Commission merely chose to include a previously constructed upstream dam and reservoir as part of the licensed project works. See Pet. App. at 83 and 136.

¹⁷ As with similar statutory construction issues, this one should be addressed in the first instance by the agency responsible for implementing the statute. See, e.g., *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972).

federal takeover and "decide them in a relicensing proceeding pursuant to the provisions of section 15."¹⁸ And Section 15 provides that where the United States does not exercise its right to take over a project, the commission is authorized to issue a new license to the original licensee or to a new licensee.

Congress never intended that Section 4(e) would apply to relicensing. Unlike initial licensing, relicensing does not change the status quo. At the relicensing stage dams and conduits have already been built,¹⁹ lands have been flooded, and generation and transmission facilities are in place to serve consumers. Moreover, where the project involves a federal reservation, each of these measures previously passed muster under Section 4(e).

Congress, of course, recognized that the considerations confronting the Commission in relicensing would be vastly different from those at initial licensing. Indeed, in contrast to the expansive issues that can dominate initial licensing, Congress intended that relicensing would focus primarily on three concerns: protection of the United States' takeover rights under Section 14, the interest of the original investors in the project, and the interests of consumers who paid for the project through their electric rates and benefited from its fuel-free power. To protect these interests Congress substituted Section

¹⁸ FPA § 14(b) and several other provisions were added to the Act in 1968. See 82 Stat. 617. They were intended to deal with problems the FERC would confront as 50-year licenses issued in the 1920's began to expire.

Dicta in *Lac Courte Oreilles Band v. FPC*, 510 F.2d 198 (D.C. Cir. 1975), states that § 4(e) applies to relicensing. *Id.* at 210-12. The question was not, however, before the court, had not been raised or briefed by any party, and had not been addressed by the Commission.

¹⁹ In fact, the application of at least one major provision of § 4(e)—the requirement that the Secretary of the Army approve the plans for any dam affecting navigation—obviously makes no sense in the case of an existing project.

15 for Section 4(e) in relicensing proceedings. This intent was clearly reflected in the 1919 Senate report on H.R. 3184, a bill identical in all relevant respects to the one enacted a year later as the Federal Water Power Act. Referring to the provision that became Section 15, the Senate Report explained:

It is the opinion of practically all those acquainted with investments of this kind that this language is necessary to insure the investment of capital in these great and much needed enterprises. The interests of the Government and public are not impaired. *The works must be continued in operation at the end of 50 years in order that the industries created by them and dependent upon them may not suffer.* Private capital should not be required to do this upon unreasonable terms *nor should its property be confiscated.* Under this provision, if the new license is not accepted, the works will be carried on under the original license from year to year with the Government free to take it over at any time that it may be prepared to do so or to turn it over to a new licensee upon terms that can be agreed upon. *In other words, the Government is free to do what it may desire to do, capital is reasonably sure of a return of its investment, and the public is assured permanent service under its own regulative agencies.*

S. Rep. No. 180, *supra*, at 2.²⁰

It should be noted in this connection that the Commission is not required to issue an *initial* license and the applicant is not required to accept that license if it disagrees with the Commission's conditions. At this point the applicant can reject the license with relatively little financial loss. In a relicensing proceeding under Section

²⁰ Also, in § 15 relicensing proceedings, FERC updates the terms and conditions of the original license so that the new license conforms to laws enacted subsequent to initial licensing. *See Hearings on H.R. 12698, 12699, Before the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 69-70 (1968).*

15, however, the Commission does not have the option of denying a license, nor is the original licensee free to abandon the project. Indeed, the original licensee would be placed in an untenable position if forced, absent federal takeover, to choose between abandoning a project it had constructed and operated for many years or accepting a license with unreasonable conditions arising at relicensing for the first time.

It was this desire to protect the investment in hydroelectric projects that led Congress to promise a new license under Section 15 on "reasonable terms," absent federal takeover. See *Hearings Before the House Water Power Committee*, 65th Cong., 2d Sess. 27-28 (1918); S. Rep. No. 180, *supra*, at 2. Section 4(e), on the other hand, has no counterpart to this provision. One of the Senate managers for the 1920 Act, Senator Myers, explained the purpose of Section 15's "reasonable terms" requirement as follows:

It occurs to me that if those words were not in the provision it would be in the power of the Government to refuse to take over a project at the end of 50 years and to tender a new license so prohibitive and on such unreasonable terms that no one would have it. . . . I do not believe under those conditions that we could find anybody willing to invest a dollar in a project of this kind. Unless there is some chance of getting the money back at the end of 50 years or getting a continuation of the lease on reasonable terms or getting a license from year to year, I do not believe anybody would ever think of engaging in an enterprise under the bill.

See 59 Cong. Rec. 1049 (1920).

In sum, FPA Section 4(e) is inapplicable to relicensing under Section 15 of the Act.

C. Where There Are No Project Works Within A Reservation, Section 4(e)'s Reservations Proviso Does Not Apply

The Court of Appeals also held that even where the project works are located outside of a reservation, Section 4(e)'s reservations proviso applies if the project "affects" or in the future "might affect" water rights appurtenant to the reservation. *See* Pet. App. at 25-28. This interpretation is plainly incorrect. It is also unnecessary and will cause substantial uncertainty and considerable potential for protracted litigation under the FPA.

1. The Reservations Proviso Applies Only To Projects That Occupy Reservation Lands

Section 4(e) provides for special conditions under which licenses for "project works" "shall be issued *within* any reservation." Section 3(2) defines "reservations" to include "tribal lands embraced *within* Indian reservations . . . and other lands and interests in lands owned by the United States, and withdrawn, reserved or withheld" As the Court of Appeals recognized, these terms describe project works constructed upon or within "reservations" having specific geographic limits.²¹ *See* Pet. App. at 26. The Court of Appeals' opinion seems to treat a water right as an extension of the land to which the right is appurtenant. This, however, represents a complete mischaracterization of the nature of a water

²¹ Reservations are created or established by geographical areas, such as surveyed land sections or specific boundaries. *See, e.g.*, 16 U.S.C. Chapters 1 (§ 1 *et seq.*) and 2 (§ 471 *et seq.*) for land descriptions of national parks and forests; and 16 U.S.C. §§ 1132 and 1274 for statutory requirements for establishing boundaries and land descriptions of wilderness areas and wild and scenic river areas. *See also* *FPC v. Tuscarora Indian Nation*, *supra*, at 114 (Congress "intended to and did confine" the definition of "reservation" to "tribal lands embraced within Indian reservations" and other reservations "located on lands owned by the United States").

right, which is simply a usufructuary right.²² Dams upstream do not of themselves infringe upon downstream water rights so long as they do not impair the enjoyment of the rights below. Similarly, a diversion of water does not infringe upon a lower water right so long as the lower owner can still exercise his right. Thus, although water rights appurtenant to a reservation may be protected in appropriate judicial proceedings from infringement by persons outside the reservation, those rights do not represent an extension of the reservation boundaries. Project works cannot lie within a water right.²³

Furthermore, Congress' intent that the reservations proviso apply only when project works would be inside a reservation's territorial boundaries is borne out by the manner in which Congress in 1921 prohibited licensing of project works "*within the limits as now constituted* of any national park or national monument." See 41 Stat. 1353. Similar prohibitions were applied to subsequent new parks and additions to existing ones.²⁴ None of these prohibitions on licensing applied to projects outside of park boundaries even though they might "affect" a park. In 1935 when the Federal Water Power Act was re-enacted as FPA Part I, this policy was generalized by amending Section 3(2) to provide that the term "reservations" "shall not include national monuments or national parks." This not only removed national parks and monuments from Commission licensing authority, but

²² 1 R. Clark, *Waters and Water Rights* § 53.2 (1967).

²³ Congress was aware that water rights were and would continue to be important in the development and operation of hydroelectric projects. This is evident in FPA § 3(11), which includes "water-rights" in the definition of the term "project," and § 27, which provides that nothing in the FPA may be construed as affecting state laws relating to water rights.

²⁴ See, e.g., 16 U.S.C. § 45c ("within the limits of [Sequoia National] park") (1926); 16 U.S.C. § 47b (with respect to "lands [described in 16 U.S.C. § 47a] added to the Yosemite National Park") (1930).

also as a consequence removed them from the operation of the reservations proviso. If, on the other hand, the proviso were applied to projects "affecting" reservations, the illogical result would be that "affected" national forests are covered but "affected" national parks and monuments are not.²⁵

2. *The Court Of Appeals' Extended Definition Of Reservation Is Unnecessary*

The Court of Appeals enlarged the application of the reservations proviso solely because it believed that the Commission would otherwise be free to defeat a reservation's purpose, such as by granting a license for a project that could turn a reservation into a "barren waste." See Pet. App. at 28. This represents a complete misapprehension of the limits on the Commission's authority.

The court overlooked a fundamental fact: the Commission is already required by Section 10(a) of the Act to consider fully all impacts of a proposed project on every legitimate public interest. See *Udall v. FPC*, 387 U.S. 428, 450 (1967); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966). This necessarily includes any effects on water rights the Court of Appeals sought to include in Section 4(e)'s proviso. Thus, although Section 4(e) authorizes the Commission to license project works which may to some extent interfere with Indian reservations, this authority is subject not only to the requirements of

²⁵ It should also be noted that there is a substantial difference between occupancy of a reserved area and incidental effects to the reserved area. In enacting the Wild and Scenic Rivers Act (16 U.S.C. § 1271 *et seq.*) Congress prohibited the licensing of project works "on or directly affecting" a designated wild or scenic river. But Congress expressly provided that this would not "preclude the licensing of . . . developments below or above a wild, scenic or recreational river area . . . which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on October 2, 1968." See 16 U.S.C. §§ 1278(a) and 1278(b).

the reservations proviso, when applicable, but also to the obligation of all federal agencies to act consistent with the United States' fiduciary obligations to the Indians.

Indeed in this case the Commission made clear its intention not to interfere with the affected Indian Bands' water rights and included a license condition for that purpose.²⁸ Nevertheless, if a project license cannot properly accommodate water rights, the Commission's obligations under Section 10(a) may require denial of the license. *Udall v. FPC*, *supra*, at 437. In the case of projects "within any reservation," Section 4(e)'s proviso requires a further explicit finding by the Commission. But neither the words of the Act nor legislative history reflects any intention to apply the additional requirements of the proviso to projects located outside the geographical boundaries of a federal reservation.

3. Enlarging The Application Of The Reservations Proviso Would Inject Unnecessary Complications And Uncertainty Into The Licensing Process

Finally, the Court of Appeals' extension of the Section 4(e) reservation proviso beyond the geographical boundaries of federal reservations injects substantial uncertainty and an enormous potential for protracted litigation under the FPA.

In this case the Court of Appeals went no further than to state that the three reservations "may be affected by the project, as they lie below the project in the San Luis Rey River watershed." Pet. App. at 25. This illustrates the inherent difficulties which arise from the court's interpretation. In effect, the court requires the Commis-

²⁸ The water rights of the three Indian Bands that are at issue here are the subject of pending litigation, see Pet. App. at 65 and 108, and the Commission included a license condition (Article 28) under which the operations plan for the Escondido project may be modified upon petition by the Bands after completion of the litigation.

sion to comply with the reservations proviso for every reservation that *might*, even remotely, be "affected" by a project. The evidentiary problems of supporting proviso findings for every potential effect would be extensive and the Commission would find it difficult to know when its task was complete. The magnitude and nature of reservation water rights²⁷ and possibly other appurtenant rights, such as hunting and fishing,²⁸ could be the subject of prolonged controversy.

For 63 years of administration under the Federal Power Act there has been no need to apply Section 4(e)'s proviso to these interests. The Commission can and has fully protected them under its Sections 6 and 10(g) conditioning powers. If other agencies are now found to have overriding conditioning powers with respect to an as yet undefined class of federal reservations located outside of project boundaries, the future administration of the Act will be handicapped and often governed by narrow interests.

²⁷ See, e.g., *United States v. New Mexico*, 438 U.S. 696 (1978) (5-4 decision holding, on facts of particular case, that water rights for the Gila National Forest were reserved only for maintenance of timber and to secure favorable water flows, and not for recreation, wildlife, and other purposes).

²⁸ See, e.g., *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87-89 (1918) (reservation of islands for Indian tribe impliedly reserved adjacent waters exclusively for Indian fishing), and *United States v. Winans*, 198 U.S. 371, 381 (1905) (Indian fishing rights reserved outside boundaries of reservation).

IV. CONCLUSION

For the foregoing reasons we submit that the decision of the court below misconstrues the meaning and application of the Section 4(e) proviso and should be reversed.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1983

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO
and VISTA IRRIGATION DISTRICT,

Petitioners,
v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA and
PALA BANDS OF MISSION INDIANS, and
THE SECRETARY OF INTERIOR in his capacity
as trustee for said Bands,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE
JOINT BOARD OF CONTROL OF THE FLATHEAD,
MISSION AND JOCKO VALLEY IRRIGATION DISTRICTS
OF THE FLATHEAD IRRIGATION PROJECT, MONTANA,
IN SUPPORT OF PETITIONERS

IN SUPPORT OF REVERSAL

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF THE JOINT BOARD OF CONTROL	1
ARGUMENT	7
INTRODUCTION	7
SECTION 8 OF IRA EXPRESSLY PRECLUDES INDIAN TRIBES FROM RESTRICTING GOV- ERNMENT GRANTS OR USES OF EASE- MENTS OR RIGHTS-OF-WAY ON TRIBAL LANDS	9
IN ANY EVENT SECTION 16 OF IRA NEED NOT BE READ AS REQUIRING TRIBAL CON- SENT IN THIS CASE, BUT SUCH REQUIRE- MENT WOULD BE PLAINLY INCONSISTENT WITH THE EXPRESS PROVISIONS AND PUR- POSES OF THE FEDERAL POWER ACT	11
A REQUIREMENT OF TRIBAL CONSENT WOULD CONTRAVENE SETTLED PRINCI- PLES OF STATUTORY CONSTRUCTION BY EFFECTUATING AN IMPLIED REPEAL OF FERC'S LICENSING AUTHORITY	15
CONCLUSION	17

TABLE OF AUTHORITIES

	Page
Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977) ..	12
Confederated Salish & Kootenai Tribes v. United States, 199 Ct.Cl. 599, 467 F.2d 1315 (1972)	2
Escondido Mutual Water Co. v. Federal Energy Regulatory Comm'n, 692 F.2d 1223 (1982), reh'g denied, 701 F.2d 826 (9th Cir. 1983)	<i>passim</i>
Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960)	13, 14
Hynes v. Grimes Packing Co., 337 U.S. 86 (1949) ..	11
Lac Courte Oreilles Band v. Federal Power Comm'n, 166 U.S. App. D.C. 245, 510 F.2d 198 (1975)	7, 14
Montana Power Company, 23 F.E.R.C. ¶ 61,464 (June 30, 1983)	3, 5
Morton v. Mancari, 417 U.S. 535 (1974)	15, 17
Nevada v. United States, 51 U.S.L.W. 4974 (U.S. June 24, 1983)	4
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Plains Electric Generation & Transmission Coop. v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976)	10
United States v. United Continental Tuna Corp., 425 U.S. 164 (1976)	15
Winters v. United States, 207 U.S. 564 (1908)	7-8
 Constitutional Provisions:	
U.S. Const., Art. IV, § 3, cl. 2 (Property Clause) ..	13
 Statutes:	
Act of February 8, 1887, 24 Stat. 388 (General Allotment Act)	9, 10
Act of January 12, 1891, 26 Stat. 712 (Mission Indian Relief Act)	<i>passim</i>
Act of May 29, 1908, 35 Stat. 444, 448-50	4
Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. §§ 791a et seq. (Federal Power Act) ..	<i>passim</i>

TABLE OF AUTHORITIES—Continued

	Page
Section 3(2), 16 U.S.C. § 796(2)	14, 16, 17
Section 4(e), 16 U.S.C. § 797(e)	<i>passim</i>
Section 10(e), 16 U.S.C. § 803(e)	3, 5, 14, 15, 17
Section 15(a), 16 U.S.C. § 808(a)	4, 5, 12
Section 29, 16 U.S.C. § 823	8
Act of May 10, 1926, 44 Stat. 453, 465	2
Act of March 7, 1928, 45 Stat. 200, 212-13	2
Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461 <i>et seq.</i> (Indian Reorganization Act)	<i>passim</i>
Section 1, 25 U.S.C. § 461	9
Section 2, 25 U.S.C. § 462	9
Section 3, 25 U.S.C. § 463	9, 10, 14
Section 16, 25 U.S.C. § 476	<i>passim</i>
Section 17, 25 U.S.C. § 477	9, 12
Act of May 25, 1948, 62 Stat. 269	4
Montana Code Ann. §§ 85-7-1601 <i>et seq.</i> (1981)....	1

Legislative History:

59 Cong. Rec. 1534 (January 14, 1920)	8
59 Cong. Rec. 1566 (January 15, 1920)	8
69 Cong. Rec. 2478, 2479, 2487 (February 4, 1928)	3
78 Cong. Rec. 11123 (June 12, 1934)	16
78 Cong. Rec. 12161, 12163 (June 16, 1934)	10
H.R. Rep. No. 910, 66th Cong., 2d Sess. (1920)....	8
H.R. Rep. No. 1804, 73d Cong., 2d Sess. (1934)....	10
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S. Rep. No. 1080, 73d Cong., 2d Sess. (1934)	11, 16
Survey of Conditions of the Indians of the United States (Part 10, Flathead Reservation, Mont.), Hearings before a Subcomm. on Indian Affairs, U.S. Senate, 71st Cong., 2d Sess. (1930)	3

Treatises:

F. Cohen, Handbook of Federal Indian Law	
1942 ed.	10
1958 ed.	12, 16
1982 ed.	16
1A Sutherland Statutory Construction § 23.10 (C. Sands ed. 1972)	15

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IN SUPPORT OF PETITIONERS**

**STATEMENT OF INTEREST OF
THE JOINT BOARD OF CONTROL**

The Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts was organized in 1980 by its three constituent Montana irrigation districts ("the Districts"), pursuant to Sections 85-7-1601 *et seq.* of the Montana Code Annotated, to act as operating

agent for the Districts. The Districts include the Indian and non-Indian lands (other than Indian trust lands) irrigated by the Flathead Irrigation Project ("Irrigation Project") of the Flathead Indian Reservation, Montana ("Reservation").¹

The Districts were incorporated under Montana law in 1926, in response to the Act of May 10, 1926, 44 Stat. 453, 465, whereby Congress expressly conditioned continued construction of an Irrigation Project power generating facility at the site of the present Kerr Hydroelectric Development of the Montana Power Company (as well as availability of additional federal funds for any Irrigation Project construction) upon formation of Montana irrigation districts embracing lands irrigable by the Irrigation Project, and execution by such districts of contracts with the United States assuring repayment of reimbursable construction and other Irrigation Project costs to the United States, upon security of a first lien on district lands. The 1926 legislation provided that revenues from the sale of power long in process of development by the Irrigation Project at the Kerr site would be used first to repay costs of the power development, and then to repay other reimbursable Irrigation Project construction and other costs.

Before execution by the Districts of repayment contracts as contemplated by the 1926 legislation, Congress, by the Act of March 7, 1928, 45 Stat. 200, 212-13, authorized the Federal Power Commission, "in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior," to license the reserved or appropriated water power rights of the Irrigation Project at the Kerr site to a private company or

¹ For a survey of the history of the Reservation, the Irrigation Project, and the Districts, see *Confederated Salish & Kootenai Tribes v. United States*, 199 Ct. Cl. 599, 467 F.2d 1315 (1972).

companies for more extensive development.² The 1928 legislation also provided that the annual rental required by Section 10(e) of the Federal Water Power Act for necessary easements and rights-of-way affecting lands of the Confederated Salish and Kootenai Tribes ("the Reservation Tribes") should be paid to the Reservation Tribes and bear interest at a stipulated rate.

In 1930 the Federal Power Commission in fact issued a license (License No. 5) to the Rocky Mountain Power Company, Montana Power Company's predecessor, to develop a large generation facility at the Kerr site. Consistent with the 1928 enabling legislation and at the behest of the Secretary of the Interior, the Commission, by Article 26 of License No. 5, granted certain blocks of low cost electric energy to the Irrigation Project for use for pumping and resale to power customers within the Reservation, as compensation for use by the licensee of the Irrigation Project's prior rights to the Kerr site. *See Montana Power Company* (Project No. 5-003), 23 F.E.R.C. ¶ 61,464 (issued June 30, 1983). The Commis-

² This special legislation was required because Congress recognized that the Federal Water Power Act of 1920 did not authorize displacement, in favor of a Federal Power Commission licensee, of the Irrigation Project development already in progress. *See, e.g.*, 69 Cong. Rec. 2478 (February 4, 1928). The requirement for separate Secretarial approval was included in the special legislation to assure that the Irrigation Project, as well as the Reservation Tribes, would receive proper compensation from the licensee. *See, e.g.*, the testimony of Louis C. Crampton, Chairman of the House Appropriations Subcommittee which reported the special legislation essentially as enacted, before the Federal Power Commission in 1929, reprinted in Part 10 ("Flathead Reservation, Mont.") of the Survey of Conditions of the Indians of the United States, Hearings before a Subcommittee on Indian Affairs of the U.S. Senate, 71st Cong., 2d Sess., April 10, July 24, 25, 1930 at 4298-4306. At the time of enactment of the special legislation, Congress recognized that the Reservation Indians, whose tribal lands were involved, did not own the water power rights previously set aside by the Government for the Irrigation Project. *See, e.g.*, 69 Cong. Rec. 2479, 2487.

sion also fixed an annual rental to be paid to the Reservation Tribes for the use of tribal lands.

Pursuant to the Act of May 25, 1948, 62 Stat. 269, revenues from Irrigation Project resale of the low cost energy furnished to the Irrigation Project pursuant to Article 26 of License No. 5 must be employed for reimbursement, first, of Project power distribution system construction costs; then for reimbursement of other Project construction costs including irrigation construction costs; and finally for other Irrigation Project purposes.

The Indian and non-Indian owners of lands irrigated by the Irrigation Project are, as such, beneficial owners of the Irrigation Project and of its associated water and water power rights, including the right to continue to receive low cost power from the licensee of the Kerr Development for irrigation pumping and for resale to power customers on the Reservation. See *Nevada v. United States*, 51 U.S.L.W. 4974, 4977-79 (U.S. June 24, 1983). In addition, pursuant to the Act of May 29, 1908, 35 Stat. 444, 448-50, these landowners will by law ultimately succeed to the management and operation of the Irrigation Project. Accordingly, the Joint Board, as the representative of these landowners, speaks for the beneficial owners and future managers and operators of the Irrigation Project and its associated water and water power rights, including the right to continue to receive low cost energy from the present and any future licensee or operator of the Kerr Hydroelectric Development. As such, the Joint Board has a great interest in protecting the Irrigation Project's rights, and in assuring the development of available resources needed to meet increasing demand for water and power on the Reservation.

Accordingly, the Joint Board has sought and been granted intervention by the Federal Energy Regulatory Commission ("FERC") in proceedings now in process, pursuant to Section 15(a) of the Federal Power Act, 16

U.S.C. § 808(a), looking toward the relicensing of the Kerr Hydroelectric Development. See *Montana Power Company* (Project No. 5-003), 23 F.E.R.C. ¶ 61,464 (issued June 30, 1983), *supra*.³ In addition, in order to assure development of available and needed supplemental power, the Joint Board has applied to FERC for preliminary permits for low-head hydropower developments at various sites on the Reservation.⁴ In all those proceedings the Reservation Tribes, who are organized pursuant to the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461 *et seq.*, have invoked statutory provisions at issue in the instant case—Sections 4(e) and 10(e) of the Federal Power Act, and Section 16 of the Indian Reorganization Act—to assert that FERC is absolutely powerless to relicense the Kerr Development, or to issue the preliminary permits, without the Tribes' consent.

In the instant case, a majority of a Ninth Circuit three-judge panel has held that FERC's express authority to license and relicense Indian reservation lands for hydropower projects, contained in Section 4(e) and 15(a) of the Federal Power Act, does not override Section 8 of the Mission Indian Relief Act, Act of January 12, 1891, 26 Stat. 712 ("MIRA"), which the majority interpreted

³ The original 50-year license for the Kerr Development (License No. 5) expired on May 22, 1980. The Montana Power Company, the present licensee, and the Reservation Tribes have filed competing applications for a new license for the Development. The Montana Power Company does not object in principle to the continuation of low cost energy for the Irrigation Project, but the Tribes vigorously oppose it. It is anticipated that the competing applications will proceed to hearing in 1984. In the interim, the expired license is renewed annually.

⁴ Lower Crow Creek Project (Project No. 5208-001); Mission Dam Power Project (Project No. 5653-000); Post Creek Power Project (Project No. 5655-000); and Dry Creek Power Project (Project No. 5656-000). See 46 Fed. Reg. 61706-08 (December 18, 1981); *id.* 62497-98 (December 24, 1981). The Tribes have intervened in the above-referenced preliminary permit proceedings and they oppose issuance of any permits.

as giving the Mission Bands an unreviewable power to prevent any unwanted use of their reservation lands. The majority's conclusion was based on a belief that the requirement of Section 4(e) of the Federal Power Act for a finding that grant of a license will not interfere or be inconsistent with the purpose of an affected reservation would be rendered "meaningless" if an applicable preexisting Indian right were held abrogated by any conflict with the new statute. 692 F.2d 1223, 1233; Appendix to Petition for Writ of Certiorari ("Pet. App.") at 21. Circuit Judge Anderson, in a concurring and dissenting opinion on rehearing, pointed out, as the Reservation Tribes have done in the FERC proceedings referred to above, that Section 16 of IRA, 25 U.S.C. § 476, contains a general provision empowering organized tribes to prevent sale, disposition, lease, or encumbrance of tribal lands without their consent. Presumably the Ninth Circuit panel might also hold that FERC's licensing power with respect to Indian reservations cannot be held to override Section 16 of IRA, applicable to organized tribes, without rendering meaningless the requirement of Section 4(e) for a finding of non-interference and non-inconsistency. Such a holding might result in FERC's being powerless to do other than the will of the Reservation Tribes in the proceedings of vital interest to the Joint Board referred to above.

ARGUMENT

Introduction

The Joint Board submits that, for reasons ably stated by Circuit Judge Anderson in his referenced separate opinion on rehearing, 701 F.2d at 829; Pet. App. at 37, the majority of the panel was clearly mistaken in its interpretation of Section 8 of MIRA as the exclusive means by which the necessary rights-of-way and easements over the reservation lands could be acquired. However, if the panel did not err in so holding (so that the Commission's power under Section 4(e) to license Indian reservation lands must indeed be read as inconsistent with and repugnant to Section 8), the panel plainly erred in concluding that the Section 8 "veto power" must be preserved in order not to render meaningless the requirement of Section 4(e) for a finding that a proposed license will not interfere with or be inconsistent with the purpose of an affected Indian reservation.

Equating a veto power with the purpose for which a reservation was established substitutes a particular procedural remedy for the substantive reasons for the establishment of Indian reservations and is plainly contrary to well reasoned authority.⁵ In fact, if it is assumed

⁵ See, e.g., *Northern States Power Company*, 50 F.P.C. 753 (1973). The Joint Board believes that the divided panel's rather off-hand treatment of this point was premised on Circuit Judge Wright's extraneous dictum in *Lac Courte Oreilles Band v. Federal Power Comm'n*, 166 U.S. App. D.C. 245, 257-59, 510 F.2d 198, 210-12 (1975). That dictum was unnecessary to the disposition of the case before the Court of Appeals for the District of Columbia Circuit, and was in turn based on Commissioner Moody's dissenting opinion in the same case. *Id.* at 259, 510 F.2d at 212 (MacKinnon, J., concurring and dissenting). As Judge MacKinnon noted in his concurring and dissenting opinion in *Lac Courte*, this interpretation of Section 4(e) is contrary to the legislative history of the Federal Power Act and "would prevent the use of any lands in a 'reservation' (including tribal lands) in a power project." *Id.* This analysis also ignores that the real substantive purpose of all reservations, i.e., to provide the Indians with a permanent home, see *Winters v.*

arguendo that the panel was correct as to the all inclusive intent of Section 8, then the licensing power contained in Section 4(e) of the Federal Power Act is plainly inconsistent with Section 8, and pursuant to Section 29 of the Federal Power Act, 16 U.S.C. § 823, Section 8 was, to the extent necessary, repealed.⁶ The legislative history of Section 4(d) of the Federal Water Power Act (reenacted in 1935 as Section 4(e) of the Federal Power Act), leaves no doubt that Congress did intend by Section 4(e) to empower the Federal Power Commission (and its successor, FERC) to license Indian reservation lands without need of Indian consent.⁷ The requirement in Section 4(e) for a non-interference and non-inconsistency finding, as well as the provisions for an Indian rental contained in Section 10(e) of the same Act, show conclusively that Congress believed it was enacting a comprehensive method for the granting of easements and rights-of-way over Indian lands necessary for power developments, with provision of adequate safeguards and compensation for affected tribes.

United States, 207 U.S. 564, 576 (1908), cannot be interfered with or destroyed by any project in any case, because of the necessity for non-interference and non-inconsistency findings specifically required by Section 4(e).

⁶ As the panel opinion recognizes, Congress plainly retained ample power to substitute a different method for authorizing use of Indian reservation lands held in trust by the United States. 692 F.2d at 1232; *Pet. App.* at 18.

⁷ During the debate on the Federal Water Power Act, the Senate passed an amendment to Section 4(d) (which later became Section 4(e) of the Federal Power Act) unequivocally requiring tribal consent as a prerequisite to issuance of a license involving easements or rights-of-way over tribal lands. 59 Cong. Rec. 1534 (January 14, 1920). It was clearly understood that, absent this amendment, tribal consent would *not* be required, *id.* 1566 (January 15, 1920). But the amendment was rejected in conference and stricken from the bill, the conferees observing that they "saw no reason why water-power use should be singled out from all other uses of Indian reservation land for special action of the council of the tribe." H.R. Rep. No. 910, 66th Cong., 2d Sess. 8 (1920).

If this Court concludes, as would seem required, that FERC's comprehensive authority under Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), obviates any necessity for obtaining tribal consent under MIRA, then the Court may find it necessary to address whether Section 16 of IRA, 25 U.S.C. § 476, imposes a separate requirement of Indian consent. As Circuit Judge Anderson noted in his separate opinion, this issue arises because the San Pasqual Band of Mission Indians is an organized tribe, having adopted a constitution pursuant to Section 16 of IRA. 701 F.2d at 829; Pet. App. at 38. For the following reasons, the Joint Board submits that Judge Anderson was clearly correct in concluding that Section 16 of IRA does not impose a separate requirement of Indian consent.

SECTION 3 OF IRA EXPRESSLY PRECLUDES INDIAN TRIBES FROM RESTRICTING GOVERNMENT GRANTS OR USES OF EASEMENTS OR RIGHTS-OF-WAY ON TRIBAL LANDS

Congress specifically curtailed the scope of powers given to Indian tribes by Sections 16 and 17 of IRA, 25 U.S.C. §§ 476 & 477, by expressly excluding therefrom any power to restrict the Government from the granting or use of permits for easements or rights-of-way. In Section 3 of IRA, Congress provided in pertinent part that

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes.

The quoted language, now codified at 25 U.S.C. § 463 (b) (4), was part of a separate, free-standing second paragraph of Section 3 of IRA as enacted. The first section of IRA, 25 U.S.C. § 461, put an end to all allotment in severalty pursuant to the General Allotment Act, or Dawes Act, Act of February 8, 1887, 24 Stat. 388. Section 2 of IRA extended trust status, and restrictions on alienation of Indian lands, indefinitely. The first para-

graph of Section 3 of IRA "restored" to the Indian tribes all their unallotted lands formerly authorized to be sold or otherwise disposed of by the Dawes Act or other legislation, but not sold or disposed of.⁸

Although nothing has been found in the legislative history of IRA to confirm the precise scope and import of the above-quoted language from the second paragraph of Section 3, codified as 25 U.S.C. § 463(b)(4), the United States Court of Appeals for the Tenth Circuit apparently agrees with the Joint Board that its purpose and effect must have been to restrict powers vested in organized tribes by Section 16 by excluding therefrom the power to prevent the grant of easements for important purposes. *Plains Electric Generation & Transmission Coop. v. Pueblo of Laguna*, 542 F.2d 1375, 1380 and n.4 (10th Cir. 1976) ("rights of way were perhaps not governed" by 25 U.S.C. § 476 in light of language of 25 U.S.C. § 463(b)(4)). The purpose of 25 U.S.C. § 463(b)(4) certainly was not to save rights and claims attaching to tribal lands before restoration thereof pursuant to the first paragraph of Section 3, because the first proviso of that paragraph expressly accomplishes that saving function with respect to "restored" lands. There is also no indication that what is now 25 U.S.C. § 463(b)(4) was enacted to affect only the Papago Reservation lands dealt with in the referenced provisos to the first paragraph. Thus, the operative effect of 25 U.S.C. § 463(b)(4) is to insulate Government grants of easements or rights-of-way, including such grants in conjunction with the issuance of FERC hydropower licenses, from the exercise of any tribal "veto power" derived from Section 16.

⁸ "[A]part from . . . lengthy provisos relating to the Papago Reservation," F. Cohen, *Handbook of Federal Indian Law* 84 (1942 ed.), the first paragraph of Section 3 authorized the Secretary of the Interior to "restore[] to tribal ownership as yet unsold portions of so-called 'surplus' and 'ceded tribal' lands." H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934); Conference Report, H.R. Rep. No. 2049, 73d Cong., 2d Sess. (1934), reprinted in 78 Cong. Rec. 12161, 12163 (June 16, 1934).

IN ANY EVENT SECTION 16 OF IRA NEED NOT BE READ AS REQUIRING TRIBAL CONSENT IN THIS CASE, BUT SUCH REQUIREMENT WOULD BE PLAINLY INCONSISTENT WITH THE EXPRESS PROVISIONS AND PURPOSES OF THE FEDERAL POWER ACT

Section 16 of IRA, 25 U.S.C. § 476, authorizes an Indian tribe to "organize for its common welfare," and to "adopt an appropriate constitution and bylaws" to become effective after tribal ratification. It provides that any constitution so adopted and ratified "shall also vest in such tribe or its tribal council" the power to retain legal counsel, to negotiate with Federal, State and local governments, and

to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe . . .

As stated in the Senate Report, the purpose of what ultimately became Section 16 of IRA was "[t]o stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations." S. Rep. No. 1080, 73d Cong., 2d Sess. 1 (1934); *see id.* 2 (Section 16 "gives to such organized tribes various limited powers"). This Court has cautioned against an expansive reading of tribal authority under the quoted clause, stating that the ostensibly broad statutory language should be given operative effect "only where there has been specific recognition by the United States of Indian rights to control absolutely tribal lands." *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 107 (1949).

As Judge Anderson succinctly stated in his separate opinion below, the legislative history of Section 16 of IRA "does not reveal Congress' intent . . . to supplant the federal government's power to dispose of or reclassify the use of its own property." 701 F.2d at 830; Pet. App. at 38. The reservation lands in question here are the

Government's property in the sense intended, in that title thereto is held by the United States. Certainly, the Mission Bands have not been given absolute control of these lands. Accordingly, it seems clear that Section 16 of IRA should not be read as conflicting with the clear congressional delegation of licensing power contained in Sections 4(e) and 15(a) of the Federal Power Act.

The proposition that Section 16 of IRA overrides the Commission's authority under the previously-enacted provisions of the Federal Water Power Act (and the corresponding portions of the subsequently reenacted Federal Power Act) fails to take account of the fact that IRA as a whole contemplated that the powers bestowed on Indian tribes would be only those which were not inconsistent with existing statutory law. Section 17 of IRA, 25 U.S.C. § 477, which permits incorporation by organized tribes, restricts the powers of the tribal corporations to such as are "not inconsistent with law." There is some doubt as to whether the corporate form of tribal organization made available by Section 17 was intended by Congress to be an alternative to, or in addition to, unincorporated organization pursuant to Section 16, *see Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977). There is not, however, any reason whatever to believe that Congress intended that an unincorporated organized tribe should be possessed of greater powers than one choosing to operate exclusively through a corporate form of organization. Hence, it would seem that Congress contemplated that the powers of all organized tribes, whether or not incorporated, would be restricted to such as would not conflict with existing law. Such an interpretation is supported by Professor Felix Cohen in his authoritative work on federal Indian law:

Tribal constitutions adopted pursuant to section 16 of the act . . . determine, primarily, the manner in which the tribe shall exercise powers *based upon existing law* F. Cohen, *Handbook of Federal Indian Law* 330 (1958 ed.) (emphasis added).

In any case, it is significant that the San Pasqual Band's constitution, adopted and approved pursuant to Section 16 of IRA, reflects just such an understanding of Section 16. FERC's Opinion 36 herein (Pet. App. 42, 159), quotes from Article VIII of the San Pasqual Band's constitution as follows (emphasis supplied):

Section 1. The general council shall have the powers and responsibilities hereafter provided, *subject to any limitation imposed by the statutes or the Constitution of the United States.*

* * *

- (c) To veto any sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other assets of the band made by any authority other than the general council.

It would seem clear beyond controversy, therefore, that the licensing power of FERC and its predecessor pursuant to pertinent sections of the 1920 Federal Water Power Act (reenacted as part of the Federal Power Act) constitutes one of the limitations on tribal "veto power" imposed by statutes of the United States.

Moreover, the obvious generality, i.e., lack of precise focus, specificity and clarity of Section 16 of IRA, must be contrasted with the focused and precise scope of the Federal Power Act's delegation of licensing authority with respect to "reservations," which is defined to include "tribal lands embraced within Indian reservations" as only one category of "lands and interests in lands owned by the United States," *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 112, 114 (1960). Because Indian lands owned by the United States as trustee (as in the case of the Mission Indian reservations) are lands in which the United States has an interest, they clearly are encompassed within the plenary delegation of congressional Property Clause power, U.S. Const., Art. IV, § 3, cl. 2, embodied in Section 4(d) of the Federal Water Power Act (subsequently Section 4(e) of the Federal Power Act), subject to the payment to the

United States pursuant to Section 10(e) of annual charges "recompensing it [i.e., the United States] for the use, occupancy, and enjoyment of its lands or other property." See *Federal Power Comm'n v. Tuscarora Indian Nation*, *supra* at 114.

A holding that the licensing of "tribal lands embraced within Indian reservations" is dependent upon tribal consent would in effect judicially excise one discrete category of federal "reservations" from the licensing power which Congress has delegated to the Commission. This incongruous reading of the statute would create two disparate schemes of licensing in which hydropower projects on Indian reservations could be licensed only with tribal concurrence, while the licensing of projects on all other federal "reservations" would remain within the prerogative of the Commission, as Congress intended. This interpretation would fundamentally disrupt the framework which Congress carefully constructed in Sections 3(2), 4(e) and 10(e) of the Act with respect to the licensing, use and compensation for use of lands or interest in lands in which the United States has an interest, and would represent a marked departure from this Court's analysis of the statutory interplay in *Tuscarora Nation*, *supra*.

If the Court does not agree that the entire matter of easements and rights-of-way was taken out of Section 16 by Section 3 of IRA, as argued *supra*, the provisions of the Federal Power Act and the language of Section 16 of IRA can be harmonized only if the authority vested in Indian tribes by Section 16 is subordinated to FERC's exercise of congressionally delegated licensing authority. Because the payment of annual charges is provided for by Section 10(e) of the Federal Power Act, this accommodation of the two statutes would not involve a taking without just compensation under the fifth amendment. See *Lac Courte Oreilles Band v. Federal Power Comm'n*, 166 U.S. App. D.C. 245, 510 F.2d 198, 208 n.38 (1975).

Finally, Section 16 of IRA, enacted in 1934, cannot be held to override Section 4(d) of the Federal Water Power

Act because Congress expressly took account of the new status of Indian tribes in the reenactment of Section 4(d) in 1935 by providing in Section 10(e) of the Federal Power Act that, in the case of licenses involving the use of tribal lands embraced within Indian reservations, FERC must fix a reasonable annual charge for the use of tribal lands "subject to the approval of the Indian tribe having jurisdiction of such lands as provided in" Section 16. Congress was mindful of the recently enacted IRA when it enacted the Federal Power Act in 1935. Had it believed that Section 16 had already given organized tribes a veto with respect to the licensing of hydroelectric projects, it would have been useless and needless to give such tribes a role in the procedures for establishing an annual charge payable upon the taking of easements and rights-of-way for such projects. Clearly, as reasoned by Circuit Judge Anderson in his separate opinion on rehearing, Congress' action in 1935 in enacting the Federal Power Act shows beyond question that Congress intended that the Federal Power Commission (now FERC) should have sole and exclusive licensing authority, without need of tribal consent.

A REQUIREMENT OF TRIBAL CONSENT WOULD CONTRAVENE SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION BY EFFECTUATING AN IMPLIED REPEAL OF FERC'S LICENSING AUTHORITY

It is a fundamental rule of statutory construction that an implied repeal of an earlier statute by a later enactment is disfavored. 1A *Sutherland Statutory Construction* § 23.10 (C. Sands ed. 1972). This principle "carries special weight" when the Court is "urged to find that a specific statute has been repealed by a more general one." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). It is apparent that any holding that the very general powers granted by Section 16 of IRA displace FERC's specific power pursuant to Section 4(d) of the 1920 Federal Water Power Act (subsequently re-

enacted as Section 4(e) of the Federal Power Act) to issue licenses for hydroelectric projects "upon any part of the . . . reservations of the United States," 16 U.S.C. § 797(e), including "Indian reservations," 16 U.S.C. § 796(2), would run afoul of this cardinal principle.

Enacted in 1934, Section 16 of IRA was intended to "provide[] a congressional sanction of self-government," F. Cohen, *Handbook of Federal Indian Law* 149 (1982 ed.). Although Section 16 embodies the congressional judgment that it was appropriate "to stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority," 78 Cong. Rec. 11123 (June 12, 1934); S. Rep. No. 1080, 73d Cong., 2d Sess. 1 (1934), Congress did not evince any intention to override the statutory scheme that it had enacted in 1920 for licensing, for hydroelectric power purposes, all "lands and interests in lands owned by the United States," including "tribal lands embraced within Indian reservations." 16 U.S.C. § 796(2). Indeed, in view of the comprehensive scheme of hydropower licensing incorporated in the Federal Water Power Act, it is more logical to attribute to Congress the expectation that the exercise of the tribal governmental power bestowed by Section 16 of IRA would be constrained by, and measured against the backdrop of, these preexisting statutory requirements. Again, as succinctly stated by Professor Cohen:

Tribal constitutions adopted pursuant to section 16 of the act . . . determine, primarily, the manner in which the tribe shall exercise powers *based upon existing law* F. Cohen, *Handbook of Federal Indian Law* 330 (1958 ed.) (emphasis added).

Thus, the facially expansive power of an Indian tribe under Section 16 "to prevent the sale, disposition, lease, or encumbrance of tribal lands" is appropriately and necessarily qualified and constrained to the full extent that Congress has entrusted the Commission to license federal "reservations" for hydropower purposes by vir-

tue of the provisions of the Federal Water Power Act which preceded the enactment of IRA. Judge Anderson, in his concurring and dissenting opinion below, applied the proper framework of analysis when he concluded that the Federal Power Act provides a "direct and specially-tailored scheme for appropriation of Indian lands" and that Sections 3(2), 4(e) and 10(e) of that Act furnished "express congressional authority for acquiring such property" notwithstanding the absence of Indian consent. 701 F.2d at 829, 830; Pet. App. at 36, 39. Because the two statutes are reconcilable in this manner, there is no "permissible justification for a repeal by implication." *Morton v. Mancari*, *supra* at 550.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case remanded to FERC for further proceedings.

Respectfully submitted,

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December 15, 1983

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ESCONDIDO MUTUAL WATER COMPANY, CITY OF
and

VISTA IRRIGATION DISTRICT,

Petitioners,

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA, and
PALLA BANDS OF MISSION INDIANS, and
THE SECRETARY OF THE INTERIOR,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE

NATIONAL WILDLIFE FEDERATION, AMERICAN
RIVERS CONSERVATION COUNCIL, CALIFORNIA
TROUT, COLORADO WILDLIFE FEDERATION,
ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL
POLICY INSTITUTE, FRIENDS OF THE
EARTH, FRIENDS OF THE RIVER, INC., IDAHO
ENVIRONMENTAL COUNCIL, IDAHO WILDLIFE
FEDERATION, IZAAK WALTON LEAGUE OF AMERICA,
INC., MONTANA WILDLIFE FEDERATION, NATIONAL
AUDUBON SOCIETY, NATURAL RESOURCES
DEFENSE COUNCIL, INC., OREGON WILDLIFE
FEDERATION, SIERRA CLUB, TROUT UNLIMITED,
VERMONT NATURAL RESOURCES COUNCIL,
WILDERNESS SOCIETY,
and WYOMING WILDLIFE FEDERATION
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February 23, 1984

Office - Supreme Court, U.S.

FILED

FEB 23 1984

ALEXANDER L. STEVAS
ESCONDIDO,
CLERK

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission may reject license conditions found necessary by federal land management agencies to mitigate damage to federal reservations from private hydroelectric power projects located within such reservations.*

* Issues before this Court but not addressed in this brief are identified at 3, n.2.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTERESTS OF AMICI CURIAE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE PLAIN MEANING OF SECTION 4(e) IS THAT THE CONDITIONS DEEMED NEC- CESSARY BY FEDERAL LAND MANAGE- MENT AGENCIES MUST BE INCLUDED BY THE COMMISSION IN HYDROELEC- TRIC LICENSES	5
II. THERE IS NO REASON TO DEPART FROM THE PROVISION'S PLAIN MEANING	6
A. The Purported "Conflict" Petitioners Have Discovered Between the Section 4(e) Pro- viso and the Rest of the Federal Power Act Is No Conflict at All, But Rather a Logical Division of Authority	7
B. The Commission Has Construed a Vir- tually Identical Provision of the Federal Power Act as Limiting Its Authority to Review Agency Conditions	11
C. Congress Has Adopted a Similar Division of Responsibility for Other Agencies	14
D. The Legislative History of the Federal Power Act Affirms the Plain Meaning of Section 4(e)	15
E. The Reading of Section 4(e) Urged by Developers and the Commission Would Render the Provision a Nullity	17
F. Developers Are Free To Challenge Any Conditions Included by Interior Which They Believe To Be Unreasonable	18
III. THE COMMISSION'S INTERPRETATION OF SECTION 4(e) SHOULD BE GIVEN NO MORE DEFERENCE THAN INTERIOR'S CONTRARY INTERPRETATION	20

	<u>Page</u>
CONCLUSION	21
APPENDIX A	
Detailed Statement of Interests	A-1
APPENDIX B	
Letter to R. Max Peterson, Chief, U.S. Forest Service, January 4, 1984	B-1
Letter from R. M. Housley, Deputy Chief, U.S. Forest Service, January 17, 1984	B-3
Letter from J. B. Hilmon, Acting Deputy Chief, U.S. Forest Service, February 14, 1984	B-5

TABLE OF AUTHORITIES

	<u>Page</u>
CASES:	
<i>American Paper Institute, Inc. v. American Electric Power Service Corp.</i> , 103 S.Ct. 1921 (1983)	2
<i>Atchison, Topeka & Santa Fe Railroad Co. v. United States</i> , 295 U.S. 193 (1935)	7
<i>Boston Sand Co. v. United States</i> , 278 U.S. 41 (1928)	6
<i>Church of the Holy Trinity v. United States</i> , 143 U.S. 457 (1892)	7
<i>Consumer Product Safety Commission v. GTE Syl- vania, Inc.</i> , 447 U.S. 102 (1980)	6, 16
<i>Escondido Mutual Water Co. v. FERC</i> , 701 F.2d 826 (9th Cir. 1983), Appendix to Petition at 31	18-19
<i>FERC v. Mississippi</i> , 102 S.Ct. 2126 (1982)	2
<i>First Iowa Hydro-Electric Cooperative v. FPC</i> , 328 U.S. 152 (1946)	16
<i>Maine v. Thiboutot</i> , 448 U.S. 1 (1980)	4
<i>McEnvoy v. United States</i> , 322 U.S. 102 (1944)	9
<i>Muller v. Oregon</i> , 208 U.S. 412 (1907)	B-1
<i>Train v. Colorado Public Interest Research Group, Inc.</i> , 426 U.S. 1 (1976)	6
<i>Udall v. FPC</i> , 387 U.S. 428 (1967)	9
<i>United States v. American Trucking Associations</i> , 310 U.S. 534 (1940)	6
<i>United States v. Katz</i> , 271 U.S. 354 (1925)	7
<i>Watt v. Alaska</i> , 451 U.S. 259 (1981)	6
<i>Weinberger v. Hynson, Wescott and Dunning, Inc.</i> , 412 U.S. 609 (1973)	17
STATUTES:	
Act of March 3, 1921, ch. 129, 41 Stat. 1353 (1921)...	5
Act of Sept. 11, 1976, Pub. L. No. 94-407, 90 Stat. 1238 (1976) (codified at 16 U.S.C. §§ 1273(a), 1278(a) (1982))	21
Administrative Procedure Act §§ 5, 7, 8, 5 U.S.C. §§ 554, 556, 557 (1982)	19
Administrative Procedure Act § 10(e), 5 U.S.C. §§ 706(2)(A)-706(2)(E) (1982)	18-19

	<u>Page</u>
Department of Energy Organization Act, 42 U.S.C. §§ 7134, 7151, 7171-7177 (1982)	3
Energy Security Act of 1980 § 408, Pub. L. No. 96-294, 94 Stat. 611 (1980) (codified at 16 U.S.C. §§ 2705, 2708 (1982))	11-13
Federal Power Act § 3(2), 16 U.S.C. § 796(2) (1982).....	5
Federal Power Act § 4(e), 16 U.S.C. § 797(e) (1982).....	<i>passim</i>
Federal Power Act § 4(f), 16 U.S.C. § 797(f) (1982).....	3
Federal Power Act §10(a), 16 U.S.C. § 803(a) (1982).....	8-9
Federal Power Act § 14(b), 16 U.S.C. § 807(b) (1982).....	6
Federal Power Act § 15, 16 U.S.C. § 808 (1982)	3
Federal Power Act § 23(b), 16 U.S.C. § 817(b) (1982).....	3
Federal Power Act § 30, 16 U.S.C. § 823a (1982)	3, 11-14
Federal Power Act § 313(b), 16 U.S.C. § 825l(b) (1982)	19
Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 (1920).....	16-18
Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667(e) (1982).....	11, 12
Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974) (codified at 16 U.S.C. §§ 1600-1687 (1982)).....	10
Hells Canyon National Recreation Area Act, §§ 3(a), 4, Pub. L. No. 94-199, 89 Stat. 1117 (1975) (codified at 16 U.S.C. §§ 460gg-2, 1274(a)(12) (1982)).....	21
Mineral Leasing Act for Acquired Lands of 1947, 30 U.S.C. §§ 351-359 (1976 & Supp. V 1981)	14-15
Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1976 & Supp. V 1981)	15
Mission Indian Relief Act of 1891, ch. 65, 26 Stat. 712 (1891).....	3

	<u>Page</u>
National Forest Management Act of 1976, Pub. L. 94-588, 90 Stat. 2949 (1976) (codified at 16 U.S.C. §§ 1600-1687 (1982)).....	10
Power Act Amendments of 1930, ch. 572, 46 Stat. 797 (1930).....	16
Power Act Amendments of 1935, ch. 687, 49 Stat. 838 (1935).....	16
Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified at 16 U.S.C. §§ 2601-2708 (1982)).....	2,3
 ADMINISTRATIVE DECISIONS:	
<i>Dryden Hydro Associates, Project No. 7030-001</i> , 26 FERC ¶ 61,135 (Feb. 6, 1984).....	8
<i>Duncan Miller</i> , 79 Interior Dec. 416 (1972)	15
<i>Fall Creek Associates, Project No. 7082-000</i> , 25 FERC ¶ 62,092 (Oct. 24, 1983)	8
<i>Great Northern Hydro Co., Project No. 7038-000</i> , 25 FERC ¶ 62,287 (Dec. 5, 1983)	8
<i>Hydro-Cor, Inc., Project No. 7176-000</i> , 25 FERC ¶ 62,096 (Oct. 24, 1983)	8
<i>Lester Kelley, et al. Project Nos. 6442-000, et al.</i> , 25 FERC ¶ 61,410 (Dec. 22, 1983)	8
<i>Mountain West Hydro, Inc., Project No. 7134-000</i> , 25 FERC ¶ 62,056 (Oct. 18, 1983)	8
<i>Sallie B. Sanford</i> , 22 Interior Board of Land Appeals 289 (1975).....	15
<i>Sierra Pacific Power Company, Project Nos. 4161-000, 4162-000, 4163-000, 4164-000</i> , 19 FERC ¶ 61,307 (1982).....	13
<i>Southern Pacific Land Company, Project No. 5585-000</i> , 19 FERC ¶ 61,297 (1982)	13
<i>Swanson Mining Corporation and Walter M. Gleason, Project No. 5677-000</i> , 20 FERC ¶ 61,226 (1982)....	13
 REGULATIONS:	
Conduit Exemption Rules, 18 C.F.R. § 4.94 (1983) ...	12
Preamble to Five Megawatts or Less Exemption Rules, 45 Fed. Reg. 76,115 (1980)	12
Protest and Intervention Rules, 18 C.F.R. §§ 385.211, 385.314 (1983).....	18

CONSTITUTION:

Commerce clause, U.S. Const. art. I, § 8, cl. 3.....	3
Property clause, U.S. Const. art. IV, § 3, cl. 2	3

TREATISE:

C. D. Sands, 2A Sutherland Statutes and Statutory Construction § 45.12 (4d ed. 1973)	17
--	----

MISCELLANEOUS:

<i>Environmental Unit to Review Procedure to Assess Hydro Impact</i> , Monitor, Vol. III, No. 20, at 1 (Oct. 3, 1983).....	8
Joint Petition of the National Marine Fisheries Service and the Tulalip Tribes of Washington for Coordination of Proceedings, for Development of Data, and for Hearing, Project Nos. 4218 et al. (filed Feb. 22, 1983)	8
Land Areas of the National Forest System, U.S. Department of Agriculture, Forest Service, FS-383, at 1 (1983).....	5
Letter from J. B. Hilmon, Acting Deputy Chief, U.S. Forest Service (Feb. 14, 1984)	5, B-5
Letter from R. M. Housley, Deputy Chief, U.S. Forest Service (Jan. 17, 1984)	B-3
Letter to R. M. Peterson, Chief, U.S. Forest Service (Jan. 4, 1984)	B-1
Memorandum of O. C. Merrill, Chief Engineer, Forest Service at 6 (Oct. 31, 1917), Joint Appendix at 369.....	16-17
Statement of Senator Walsh, 59 Cong. Rec. 1564 (1920).....	17
Statement of Secretary Houston, Hearings on Water Power Before the House Committee on Water Power, 65th Cong., 2nd Sess., at 676-77 (1918)	17
The Twelve License Conditions, Joint Appendix at 218-242, Commission's Brief at 5a-11a	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2056

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO,
and
VISTA IRRIGATION DISTRICT,
Petitioners,

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA, and
PALLA BANDS OF MISSION INDIANS and
THE SECRETARY OF THE INTERIOR,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE

NATIONAL WILDLIFE FEDERATION, AMERICAN
RIVERS CONSERVATION COUNCIL, CALIFORNIA
TROUT, COLORADO WILDLIFE FEDERATION,
ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL
POLICY INSTITUTE, FRIENDS OF THE
EARTH, FRIENDS OF THE RIVER, INC., IDAHO
ENVIRONMENTAL COUNCIL, IDAHO WILDLIFE
FEDERATION, IZAAK WALTON LEAGUE OF AMERICA,
INC., MONTANA WILDLIFE FEDERATION, NATIONAL
AUDUBON SOCIETY, NATURAL RESOURCES
DEFENSE COUNCIL, INC., OREGON WILDLIFE
FEDERATION, SIERRA CLUB, TROUT UNLIMITED,
VERMONT NATURAL RESOURCES COUNCIL,
WILDERNESS SOCIETY,
and WYOMING WILDLIFE FEDERATION
IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 36.2, the National Wildlife Federation, American Rivers Conservation Council, California Trout, Colorado Wildlife Federation, Environmental Defense Fund, Environmental Policy Institute, Friends of the Earth, Friends of the River, Inc., Idaho Environmental Council, Idaho Wildlife Federation, Izaak Walton League of America, Inc., Montana Wildlife Federation, National Audubon Society, Natural Resources Defense Council, Inc., Oregon Wildlife Federation, Sierra Club, Trout Unlimited, Vermont Natural Resources Council, Wilderness Society, and Wyoming Wildlife Federation file this brief as amici curiae in support of respondents. Letters of consent from counsel for the parties have been filed with the Clerk.

The members of amici curiae organizations use the nation's rivers on national forests and other federal reservations for fishing, hunting, canoeing, kayaking, rafting, swimming, camping, bird watching, photography, and other forms of recreation. Many of these streams and rivers will be adversely affected by hydroelectric power development. However, far from opposing all hydroelectric development, amici curiae have actively supported the balanced development of this renewable resource.¹ Amici curiae see the environmental safeguards at stake in this litigation as critical to the maintenance of that balance.

A more detailed statement regarding the interests of amici curiae is set out as Appendix A to this brief.

¹ For example, several of amici curiae filed briefs in this Court as amici curiae in support of the constitutionality of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified at 16 U.S.C. §§ 2601-2708 (1982)) (the Act provides incentives to encourage retrofitting of existing dams for power production), in *FERC v. Mississippi*, 102 S.Ct. 2126 (1982), and in support of the Federal Energy Regulatory Commission's "avoided cost" rule implementing the Act in *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 103 S.Ct. 1921 (1983).

SUMMARY OF ARGUMENT

The principle issue in this case is a straightforward question of statutory construction arising under the Federal Power Act ("FPA" or "the Act").² The FPA charges the Federal Energy Regulatory Commission ("Commission")³ with the task of licensing⁴ virtually all non-federal hydroelectric power production in the nation.⁵ In most instances the Commission has the final say (subject, of course, to judicial review) with regard to all issues affecting the license.

In granting this broad authority to the Commission, however, Congress carved out an important exception. Section 4(e)

² This brief addresses the scope of the conditioning authority in section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e) (1982). This provision, invoked here by the Department of the Interior to secure certain protections for respondent Indian Bands, is the same authority utilized by that department and other federal agencies to secure environmental mitigation for hydroelectric projects located on national forests and other federal reservations. (The term "reservations", as defined in the FPA, encompasses national forests and other withdrawn and acquired lands of the United States, except for national parks which receive protection under another statute. See this brief at 5, n.8.) The critical issue to *amici curiae* is the mandatory nature of the 4(e) conditioning authority. Of less practical concern, in the view of *amici curiae*, is the reach of that authority beyond the physical confines of the federal reservation. Consequently, *amici curiae* take no position on the question of whether a "reserved water right" is a "reservation" under the FPA. Nor do they address questions in this case relating to the rights of the Indian Bands under treaties, the Federal Power Act, 16 U.S.C. §§ 791a-825r (1982), the Mission Indian Relief Act of 1891, ch. 65, 26 Stat. 712 (1891), and other applicable law.

³ The term "Commission" refers both to the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission. See Department of Energy Organization Act, 42 U.S.C. §§ 7134, 7151, 7171-7177 (1982).

⁴ FPA §§ 4(e), 15, 23(b), 16 U.S.C. §§ 797(e), 808, 817(b) (1982). The Commission also issues preliminary permits (which secure an applicant's priority for a subsequent license), FPA § 4(f), 16 U.S.C. § 797(f) (1982), and exemptions from licensing requirements, FPA § 30, 16 U.S.C. § 823a (1982); Public Utility Regulatory Policies Act §§ 405, 408, 16 U.S.C. §§ 2705, 2708 (1982).

⁵ This licensing authority extends to all projects reached by the federal regulatory power under the commerce and property clauses of the Constitution. FPA § 4(e), 16 U.S.C. § 797(e) (1982); U.S. Const. art. I, § 8, cl. 3; U.S. Const. art. IV, § 3, cl. 2.

of the Act—the same section which empowers the Commission to license projects—contains the following limitation:

Provided, That licenses . . . within any reservation . . . shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

FPA § 4(e), 16 U.S.C. § 797(e) (1982).

The question in this case is simple. Does this statutory language “mean[] what it says”? *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Or, as petitioners would have it, should the Court “improve” upon the scheme laid out by Congress, and read into these words a new meaning such that the Commission—rather than the agencies charged with managing our federal reservations—becomes the arbiter of how much environmental protection is necessary?

ARGUMENT

This case arose over a diversion of water from the San Luis River in California. Petitioners Escondido Mutual Water Company, City of Escondido, and Vista Irrigation District (hereinafter “developers”) sought relicensing⁶ of an irrigation project which produces some incidental hydroelectric power. The Department of the Interior (“Interior”) sought to attach certain conditions to the license to protect the interests of respondents La Jolla, Rincon, San Pasqual, Pauma, and Palla Bands of Mission Indians. Developers objected to the conditions, and the Federal Energy Regulatory Commission (“Commission”) rejected ten out of twelve of Interior’s conditions.⁷

⁶ Developers initially sought relicensing of the project. However, the Commission decided to issue another “original” license because the scope of the project was substantially changed from that of the first license. This had the effect of mooted a dispute over whether the section 4(e) conditioning authority attaches to renewed as well as original licenses.

⁷ Joint Appendix at 218-242, Commission’s Brief at 5a-11a. The Commission’s brief incorrectly identifies Interior’s conditions 10, 11, and 12 as conditions 9, 10, and 11, respectively.

The case has grown into much more than a dispute over ten rejected conditions. The Commission maintains that Interior may not impose, but may only recommend to the Commission, conditions on the licenses it issues. If that is so, then neither may any other federal land management agency (hereinafter "land manager") impose conditions it finds necessary to protect those federal reservations⁸ it is charged by Congress with managing.⁹

I. THE PLAIN MEANING OF SECTION 4(e) IS THAT THE CONDITIONS DEEMED NECESSARY BY FEDERAL LAND MANAGEMENT AGENCIES MUST BE INCLUDED BY THE COMMISSION IN HYDRO-ELECTRIC LICENSES.

The dispute turns on the meaning of the following sentence. "[L]icenses . . . within any reservation . . . *shall be subject to and contain* such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation." Federal Power Act ("FPA" or "the Act") § 4(e), 16 U.S.C. § 797(e) (1982) (emphasis added).

There is no disagreement among the parties to this case as to the plain meaning of these words. Federal land managers

⁸ Under the Federal Power Act, "reservations" is defined to include "national forest, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purpose; but shall not include national monuments or national parks". Federal Power Act § 3(2), 16 U.S.C. § 796(2) (1982). National Parks are excluded from the section 4(e) provision because they receive special protection under a separate statute prohibiting the construction of hydroelectric power projects within them, Act of March 3, 1921, ch. 129, 41 Stat. 1353 (1921).

⁹ Conservationists' greatest concern is with national forest lands covering over 190 million acres, Land Areas of the National Forest System, U.S. Department of Agriculture, Forest Service, FS-383, at 1 (1983). It is estimated that in the next decade, 3,000 hydroelectric projects will be proposed for licensing on these lands alone. Letter of J. B. Hilmon, Acting Deputy Chief, Forest Service, to Christopher H. Meyer (Feb. 14, 1984) set out in Appendix B at B-5.

are charged under the FPA with determining which conditions are "necessary for the adequate protection and utilization" of federal reservations. The Commission's role in this respect is purely ministerial: it "shall" incorporate such conditions in any license it issues.¹⁰ Indeed, the Commission appears to concede in its main brief that, if the plain meaning of section 4(e) governs, the decision of the Ninth Circuit on this question must be affirmed.¹¹

II. THERE IS NO REASON TO DEPART FROM THE PROVISION'S PLAIN MEANING.

In urging the adoption of the plain meaning of section 4(e), amici curiae conservation organizations ("conservationists") do not contend that the Court is prohibited from scrutinizing the legislative history behind the Act.¹² The issue is not whether extrinsic evidence may be explored, but what happens when that exploration proves fruitless. On this point the law is also clear. "Absent a clearly expressed legislative intention to the contrary, [the statute's] language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In other words, in order to justify a departure from the plain

¹⁰ This mandatory language is in sharp contrast to other provisions of the FPA, such as section 14(b) dealing with federal takeover. "In any relicensing proceeding before the Commission any Federal department or agency *may* timely *recommend*, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects." FPA § 14(b), 16 U.S.C. § 807(b) (1982) (emphasis added). Clearly, had Congress wished to make section 4(e) conditions mere recommendations, it knew how to do so.

¹¹ "[In the decision of the Ninth Circuit below] the majority's reliance upon the plain language rule does not advance its position. It is true that Section 4(e) provides that the license 'shall' include the conditions which the Secretary deems necessary, but that does not end the inquiry." Commission's Brief at 20-21 (reference omitted).

¹² Such a blind approach to the law was abandoned long ago by this Court. "[T]he plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (quoting *Boston Sand Co. v. United States*, 278 U.S. 41, 48 (1928)); see *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976); *United States v. American Trucking Associations*, 310 U.S. 534, 543-44 (1940).

meaning of a statute, it must be demonstrated that the plain language of the act violates the legislative intent and leads to an "absurd result".¹³

A. The Purported "Conflict" Petitioners Have Discovered Between the Section 4(e) Proviso and the Rest of the Federal Power Act Is No Conflict at All, But Rather a Logical Division of Authority.

Petitioners advance four arguments to support their conclusion that the plain meaning of the section 4(e) proviso conflicts with the rest of the FPA, and must therefore be reinterpreted by the Court.

The first argument rests on the allegedly comprehensive nature of the FPA. The argument boils down to this: Because the FPA was intended to "centralize authority in the Commission", Commission's Brief at 21, Congress must not have intended section 4(e) to "undermine" the Commission's power, Commission's Brief at 20. To put it more bluntly, petitioners urge that the existence of a comprehensive organic act justifies the Commission in ignoring express congressional directives which limit its power under that act. Whatever merit this novel principle of law might otherwise have, the argument overlooks the obvious fact that each of the federal agencies involved operates under a comprehensive organic act.¹⁴ The purported "conflict" posed by the ability of federal land managers to impose license conditions against the wishes of the Commission is no more real than the conflict one might find in the Commission's ability to license a project on federal lands which the land manager believes interferes with its comprehensive management of those lands. Such abstract conflicts are better resolved by reference to statute than through judicial guesswork.

¹³ "All laws are to be given a sensible construction; and a literal application of a statute which would lead to absurd consequences, should be avoided whenever reasonable application can be given to it, consistent with the legislative purpose." *United States v. Katz*, 271 U.S. 354, 357 (1925). See *Atchison, Topeka & Santa Fe Railroad Co. v. United States*, 295 U.S. 193, 208 (1935) (dissent); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

¹⁴ See this brief at 10, n.18

Next petitioners raise section 10(a).¹⁵ FPA § 10(a), 16 U.S.C. § 803(a) (1982). Because the Commission is instructed under this section to license only those projects which are "best adapted to a comprehensive plan" for the river basin, petitioners argue that the Commission must therefore be able to reject conditions imposed by land managers under section 4(e). Commission's Brief at 19-20, n.25, 33; Developers' Brief at 33-

¹⁵ Conservationists find ironic the Commission's reliance here on the mandate for comprehensive planning under section 10(a). Environmental organizations, Indian Tribes, and government fisheries agencies have sought repeatedly to persuade the Commission that section 10(a) does, in fact, require the preparation of comprehensive plans for river basins. See, e.g., Joint Petition of the National Marine Fisheries Service and the Tulalip Tribes of Washington for Coordination of Proceedings, for Development of Data, and for Hearing, Project Nos. 4218, 4741, 4786, 4885, 5305, 5338, 5339, 5341, 5356, 5358, 5400, 5402, 5403, 5404, 5428, 5430, 5431, 5432, 5433, 5434, 5435, 5436, 5437, 5438, 5439, 5440, 5500, 5555, 5610, 5611, 5612, 6541, 5676, 5681, 5683, 5757, 5758, 5759, 5777, 5778, 5816, 5818, 5819, 5825, 5829, 5837, 5853, 5926, 6176, 6216, 6220, 6221, 6256, 6295, 6310, 6311, 6348, 6465, 6495, 6496, 6503, 6505, 6506, 6507, 6530, 6533, 6534, 6539, 6611, 6672, 6830 (filed Feb. 22, 1983) (Snohomish River Basin in Washington). Dozens of similar petitions have been filed on projects proposed within the Salmon River Basin in Idaho, the Willamette River Basin in Oregon, and the Wenatchee River Basin in Washington. To date these efforts have not been successful. While the Commission has yet to rule finally on any of these petitions, it has nevertheless issued preliminary permits over objections in the Salmon River Basin, Order Denying Appeals, *Lester Kelley, et al.*, Project Nos. 6442-000, *et al.*, 25 FERC 61,410 (Dec. 22, 1983), the Snohomish River Basin, Order Issuing Preliminary Permit, *Great Northern Hydro Co.*, Project No. 7038-000, 25 FERC 62,287 (Dec. 5, 1983), the Willamette River Basin, Orders Issuing Preliminary Permits, *Mountain West Hydro Inc.*, Project No. 7134-000, 25 FERC 62,056 (Oct. 18, 1983); *Fall Creek Associates*, Project No. 7082-000, 25 FERC 62,092 (Oct. 24, 1983); *Hydro-Cor, Inc.* Project No. 7176-000, 25 FERC 62,096 (Oct. 24, 1983), and the Wenatchee River Basin, Order Denying Appeal, *Dryden Hydro Associates*, Project No. 7030-001, 26 FERC 61,135 (Feb. 6, 1984). Moreover, on September 15, 1983, the Commission rejected, by a 4-0 vote (former Chairman C. M. Butler was not present), a staff proposal to undertake cumulative environmental impact studies for multiple hydroelectric development projects within river basins. *Environmental Unit to Review Procedure to Assess Hydro Impact*, Monitor, Vol. III, No. 20, at 1 (Oct. 3, 1983) (the Monitor is the Commission's official monthly publication). In short, the section 10(a) mandate—which the Commission here finds to be so broad—is the same mandate which the Commission has construed so narrowly that in over fifty years it has never found it necessary to prepare a single comprehensive river basin plan.

34. How this conclusion follows is unclear. Section 10(a) is a general articulation of the "public interest" considerations which govern the Commission's licensing decisions. *Udall v. FPC*, 387 U.S. 428, 450 (1967). These general principles in no way erase the more specific constraints imposed under section 4(e).¹⁶ Thus, while the Commission is guided by the section 10(a) public interest criteria in choosing the "best adapted" project, its universe for selection is limited under the FPA to projects whose harm to federal lands is mitigated through section 4(e) conditions.

Third, the Commission tells the Court that the first clause of the section 4(e) proviso conflicts with the second. Commission's Brief at 17-20. The first clause requires a finding by the Commission that "no interference or inconsistency" with the purposes of the reservation will result from the issuance of a license. The second clause contains the conditioning authority which is the subject of this litigation. There is no inconsistency here. The "no interference or inconsistency" finding is a go/no-go decision on the project. Congress withheld that power from the land managers and placed it in the hands of the Commission. Left to the land managers under the second clause is the authority, not to halt a project, but to specify mitigation measures. In so allocating authority between the agencies, Congress did not create a conflict. It struck a balance.

Finally, the Commission alludes to an "incongruous result" which it fears might flow from a literal reading of section 4(e). Commission's Brief at 19-20. What the Commission apparently has in mind is the possibility that the conditions imposed by a land manager might render a power project uneconomical and thereby in effect "veto" the license. Conservationists do not shrink from the implications of this hypothetical.¹⁷ If a private

¹⁶ Specific statutory provisions control the general. *McEnvoy v. United States*, 322 U.S. 102, 107 (1944).

¹⁷ Conservationists would emphasize, however, that the notion of arresting hydroelectric development via 4(e) conditions is nothing more than hypothetical. The practical impact of 4(e) conditions in the overwhelming majority of cases is to mitigate, not halt, development. Moreover any unreasonable conditions may be challenged by the applicant. See this brief at 18-19.

hydroelectric project on land reserved for public benefit cannot turn a profit unless mitigation measures are eliminated, then perhaps that project should not be built. There is certainly no reason to read a contrary result into a plainly worded statutory provision. If Congress wished to promote uneconomical hydroelectric development by curtailing mitigation measures, it is certainly within its power to do so. Section 4(e), however, reflects a different choice of policy.

A straightforward reading of the Act demonstrates that Congress intended to draw upon the special expertise of multiple federal agencies where federal reservations are concerned.¹⁸ Recognizing their intimate knowledge and understanding of the natural resources under their control, Congress authorized federal land managers to require whatever mitigation measures they determine are necessary for projects located within their reservations.

In so doing Congress did not "undermine the very authority" of the Commission, Commission's Brief at 20. In fact, the Commission retains full authority to make those decisions which fall within its expertise. It is for the Commission, not the land manager, to weigh competing proposals for hydroelectric development. It is for the Commission to assess the economic feasibility and structural integrity of the various projects. It is for the Commission to set the licensing fees and annual charges. And it is for the Commission to forecast energy demands for the region and consider what investments will best serve the public good.

¹⁸ Federal land managers are charged under their organic and planning acts with broad management responsibilities. For example, Congress has created an intricate system of planning for all of the national forests. Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974) (codified at 16 U.S.C. §§ 1600-1687 (1982)); National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified at 16 U.S.C. §§ 1600-1687 (1982)). These laws—which contain expressions of congressional will every bit as comprehensive and detailed as those found in the FPA—provide the Forest Service with guidelines encompassing everything from the selection of scientific committees to formulas to determine the allowable timber harvest on certain lands.

The land manager's responsibilities, on the other hand, are sharply circumscribed. The land manager must determine what mitigation measures are necessary for the "adequate protection and utilization" of the reservations under its authority, including, for example, the flows of water necessary to sustain fisheries, the devices required to permit fish migration, and the steps that must be taken to maintain water quality. In short, it is for the land manager to say what must be done to minimize destruction of public resources. These concerns may seem "parochial" to developers, Developers' Brief at 33, and the result "undesirable" to the Commission, Commission's Brief at 20, but to Congress the approach embodied in section 4(e) reflects something more substantial: a firm commitment to sound planning and balanced resource management.

B. The Commission Has Construed a Virtually Identical Provision of the Federal Power Act as Limiting Its Authority to Review Agency Conditions.

Section 4(e) of the FPA is not the only provision of federal power law authorizing other agencies to mandate binding conditions on hydropower projects within the Commission's jurisdiction. For instance, under section 30, 16 U.S.C. § 823a (1982), the Commission is authorized to make the final determination as to whether "manmade conduit" projects (operated primarily for agricultural, municipal, or industrial water supply purposes) should be exempted from licensing and other requirements, while the final authority to impose binding conditions on such exempted projects is reserved to state and federal fish and wildlife agencies.¹⁹ An identical arrangement was adopted under section 408 of the Energy Security Act of 1980, Pub. L. No. 96-294, 94 Stat. 611 (1980) (amending sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978) (codified at 16 U.S.C.

¹⁹ Section 30(c) provides in part, "[T]he Commission . . . shall include in any such exemption—(1) such terms and conditions as the Fish and Wildlife Service and the State agency each determine are appropriate to prevent the loss of, or damage to, such resources and to otherwise carry out the purposes of [the Fish and Wildlife Coordination] Act . . ." 16 U.S.C. § 823a(c) (1982).

§§ 2705, 2708 (1982)), for projects of five megawatts or less.²⁰ (Both the "conduit exemption" and the "five megawatts or less exemption" operate through section 30(c) of the FPA.)

In its implementing regulations for the "five megawatts or less exemption" the Commission specifically rejected the argument of commenters that it should evaluate the reasonableness of agency conditions.²¹

Article 2 [to be included in each exemption] requires compliance with any conditions prescribed by fish and wildlife agencies. Commenters claim that this is a forfeiture of Commission responsibilities which will deter exemption applications. they [sic] request that the Commission prescribes [sic] lenient environmental conditions where appropriate or possible, eliminate Article 2 where state licensing procedures exist, or at least urge other agencies to make conditions minimal. Section 408 of the ESA [Energy Security Act], which incorporates part of section 30 of the [Federal Power] Act, gives fish and wildlife agencies authority to establish *binding exemption conditions* for carrying out the purposes of the Fish and Wildlife Coordination Act. The Commission will not interpret the statute otherwise. However, it is for the Commission to insert the recommendations of those other agencies as conditions of an exemption.

Preamble to Five Megawatts or Less Rules, 45 Fed. Reg. 76,115, 76,120 (1980) (emphasis added).

²⁰ "The Commission may in its discretion . . . grant an exemption . . . subject to the same limitations (to ensure protection for fish and wildlife as well as other environmental concerns) as those which are set forth in subsections (c) and (d) of section 30 of the Federal Power Act . . ." Energy Security Act of 1980 § 408(b), 16 U.S.C. § 2705(d) (1982).

²¹ The implementing regulations for the conduit exemption are in accord. "The construction, operation, and maintenance of the exempt facility must comply with any terms and conditions that any Federal or State fish and wildlife agencies have determined are appropriate to prevent loss of, or damage to, fish or wildlife resources or otherwise to carry out the purposes of the Fish and Wildlife Coordination Act." Conduit Exemption Rules, 18 C.F.R. § 4.94 (1983).

In three cases in the last two years the Commission has reiterated this position. In each of these cases applicants for exemptions urged the Commission to reject conditions offered by other agencies as unreasonable. In each case the Commission insisted that it has no power to second guess the resource agencies. "It is not within our authority to review conditions imposed by fish and wildlife agencies pursuant to section 408 of the ESA [Energy Security Act]." Order on Appeal, *Swanson Mining Corporation and Walter M. Gleason, Project No. 5677-000*, 20 FERC ¶ 61,226 (1982) (a petition for rehearing on an unrelated issue was granted by the Commission in an unpublished order on April 22, 1983).²² "The Commission has no authority to modify the requirement [for minimum flows imposed by a state fish and wildlife agency]." Order Denying Appeal, *Southern Pacific Land Company, Project No. 5585-000*, 19 FERC ¶ 61,297 (1982). "[W]e find that recommendation of 150 cfs [cubic feet per second] of minimum flow is a mandatory condition Consequently, there is no reason for the Commission to hold a hearing on the minimum flow issue, as requested by Sierra." Order on Rehearing, *Sierra Pacific Power Company, Project Nos. 4161-000, 4162-000, 4163-000, 4164-000*, 19 FERC ¶ 61,307 (1982).

The Commission's position on section 30(c) simply cannot be reconciled with its position on section 4(e). The operative language of the conditioning authority under the licensing provision (section 4(e)) and the exemption provision (section 30(c)) is virtually identical. Section 4(e) uses the words "shall be subject to and contain such conditions". FPA § 4(e), 16 U.S.C. § 797(e) (1982). Section 30(c) tracks this language closely with the words "shall include in any exemption such terms and conditions". FPA § 30(c), 16 U.S.C. § 823a(c) (1982).

²² In the *Swanson* order the Commission also states that it is not bound to include terms and conditions "related not to that project's environmental impact." Conservationists have no quarrel with this contention. But that, of course, is not the question in this case. Here the Commission, while conceding that the conditions fall within the scope of section 4(e), insists on rejecting them nevertheless because it does not like the result reached by Interior.

The two provisions cannot be distinguished on the basis of what they say about the nature of the conditioning authority, because they both say the same thing. More importantly, the Commission's elaborate "contextual" argument—that section 4(e) somehow changes meaning when read in the context of the whole Federal Power Act—collides with the Commission's contrary position on section 30(c). Both provisions come from the same Act and must therefore be read in the same context. If the "comprehensive" nature of the FPA does not require the Commission to be the final arbiter of conditions under section 30(c), then this same context can hardly mandate the opposite result when applied to the nearly identical language of section 4(e).

C. Congress Has Adopted a Similar Division of Responsibility for Other Agencies.

The notion that one federal agency should be charged with issuing a license, permit, lease, or other authorization while a different federal agency is authorized to specify binding conditions is hardly novel. Under the mining laws, for example, Interior's Bureau of Land Management issues mineral leases, while other land managers attach conditions when the mining will occur on such agency's land.²³

The question of whether the mineral leasing agency may review the reasonableness of the conditioning agency's conditions bears an obvious resemblance to the question posed here under the Federal Power Act. The issue has been litigated, and

²³ The Mineral Leasing Act for Acquired Lands of 1947 provides, "No mineral deposit covered by this section shall be leased except with the consent of the head of the executive department, independent establishment, or instrumentality having jurisdiction over the lands containing such deposit, or holding a mortgage or deed of trust secured by such lands which is unsatisfied of record, *and subject to such conditions as that official may prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered . . .*" 30 U.S.C. § 352 (1976 & Supp. V 1981) (emphasis added).

the government has consistently taken the position that one agency may not second guess the other.²⁴

Of course, whether in the context of a mining lease application or a hydroelectric license application, an applicant who believes that the conditioning agency has acted unreasonably may seek relief in court.²⁵ The point is that under the mining law abuse of agency power must be corrected by a judge, not another agency. Conservationists can conceive of no rationale for a different result under the parallel provisions of the power law.

D. The Legislative History of the Federal Power Act Affirms the Plain Meaning of Section 4(e).

A thorough examination of the legislative history of the Federal Power Act yields no persuasive evidence that Congress intended anything different from what it said in section 4(e). Indeed, it strongly supports the interpretation adopted by the Ninth Circuit in the case below.

²⁴ In *Sallie B. Sanford*, 22 Interior Board of Land Appeals 289 (1975), the Interior Board of Land Appeals upheld a Bureau of Land Management decision granting a lease to the applicant subject to conditions which the U.S. Army Corps of Engineers, which administers the land where the lease was to be located, had submitted to the Bureau. The appeals board held that the Bureau of Land Management had properly required the applicant to accept the stipulations or suffer a rejection of the offer to grant the lease; and further stated that the BLM had no authority to issue the lease free of the stipulations.

This interpretation had previously been upheld by the Department of Interior in *Duncan Miller*, 79 Interior Dec. 416 (1972). In distinguishing between the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1976 & Supp. V 1981) and the Mineral Leasing Act for Acquired Lands Act of 1947, 30 U.S.C. §§ 351-359 (1976 & Supp. V 1981), the Board of Land Appeals explained that the latter expressly provided that the Secretary could only lease the applicable lands subject to those conditions which the executive department or agency having jurisdiction over the land had prescribed to insure the adequate utilization of the lands for the primary purpose for which they had been acquired. It stated further, "This Board has recognized this obligation even where it has appeared to the Board that the special stipulations requested by the administering agency were unreasonable." 79 Interior Dec. at 420 (1972), (citations omitted).

²⁵ See this brief at 18-19.

There is no disagreement with petitioners' assertion that the purpose of the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 (1920) (hereinafter "1920 Act")²⁶ was to "centralize authority in the Commission, 'instead of the piecemeal, restrictive, negative approach of the Rivers and Harbors Acts and other federal laws previously enacted' ". Commission's Brief at 21 (quoting *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 180 (1946)). Statements of this general purpose found in the legislative history, see Commission's Brief at 21-25; Developers' Brief at 34-35,²⁷ are hardly surprising and certainly of no consequence to the issue at hand.

Far more significant are the three direct references in the legislative history of the 1920 Act to the section 4(e)²⁸ conditioning proviso. Each of these conforms to the plain meaning of section 4(e).²⁹

²⁶ The Federal Water Power Act of 1920 was later incorporated, as Subchapter I, into the Federal Power Act, Power Act Amendments of 1935, ch. 687, 49 Stat. 838 (1935).

²⁷ Much of petitioners' discussion of the legislative history actually explores the 1930 amendments to the 1920 Act, Power Act Amendments of 1930, ch. 572, 46 Stat. 797 (1930). Commission's Brief at 25-26; Developers' Brief at 35-37. This history is not even directed to section 4(e)—which has never been amended—and, even if it were, would be of limited utility in interpreting congressional intent ten years earlier. "Thus, even when it would be otherwise useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980).

²⁸ Section 4(e) of the FPA was designated section 4(d) in the Federal Water Power Act of 1920.

²⁹ Mr. O. C. Merrill, the principal architect of the bill, summarized the conditioning authority as follows:

Licenses for power sites within the National Forests to be subject to such provisions for the protection of the Forest as the Secretary of Agriculture may deem necessary. Similarly, for parks and other reservations under the control of the Departments of the Interior and of War. Plans of structures involving navigable streams to be subject to the approval of the Secretary of War.

This provision is for the purpose of preserving the administrative responsibility of each of the three Departments over lands and other matters within their exclusive jurisdiction.

(footnote continues)

E. The Reading of Section 4(e) Urged by Developers and the Commission Would Render the Provision a Nullity.

It is not to be presumed that Congress means merely to restate the obvious when it enacts provisions of law.³⁰ Yet this is precisely the result urged upon the Court by petitioners in their claim that section 4(e) merely authorizes federal land managers to make recommendations to the Commission. This

(footnote continued)

Memorandum of O.C. Merrill, Chief Engineer, Forest Service at 6 (Oct. 31, 1917), Joint Appendix at 369, 373-74.

During a floor debate Senator Walsh spoke in opposition to an amendment to the 1920 Act to create a tribal veto for projects on Indian lands because the Indians' interests were already well protected under section 4(e):

[T]he matter goes before the commission, which consists of the Secretary of War, the Secretary of the Interior and the Secretary of Agriculture. They all agree that it is in the public interest that the license should be granted, or a majority of them so agree. Furthermore, the head of the department must agree; that is to say, the Secretary of the Interior in the case of an Indian reservation must agree that the licence shall be issued.

59 Cong. Rec. 1564 (1920); see Developers' Brief at 14.

Secretary of Agriculture David F. Houston testified along the same line:

If I am not mistaken, the provisions in the proposed measure are more restrictive than existing law, in that they require the assent of three heads of departments [the Departments of War, Agriculture, and Interior which formed the original Commission] and also the assent of the particular head of the department immediately charged with that government interest.

Hearings on Water Power Before the House Committee on Water Power, 65th Cong., 2nd Sess., at 678 (1918).

³⁰ "A statute is a solemn enactment of the state acting through its legislature and it must be assumed that this process achieves an effective and operative result. It cannot be presumed that the legislature would do a futile thing." C. D. Sands, 2A Sutherland Statutes and Statutory Construction § 45.12 (4d ed. 1973). In other words, statutes are to be read in such a way that they add something to the law. It is a "well-established rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger v. Hyson, Wescott and Dunning, Inc.*, 412 U.S. 609, 633 (1973).

is so because federal agencies need no special authorization to recommend conditions to the Commission. Any interested person may do that.³¹

The suggestion that section 4(e) conditions were meant to be mere recommendations is even more pointless when considered in the context of the provision's origins in the Federal Water Power Act of 1920, at which that time the Secretaries of the Interior and Agriculture actually sat on the Commission. They clearly did not need section 4(e) in order to make "recommendations" to their fellow Commissioners. If section 4(e) adds anything, it must shift from the Commission to federal land managers the authority to *decide* what mitigation measures are needed to protect federal reservations.

F. Developers Are Free To Challenge Any Conditions Included by Interior Which They Believe To Be Unreasonable.

Developers and the Commission refer frequently in their briefs to the "veto power" section 4(e) would bestow upon federal land managers if its plain meaning were adopted. Developers' Brief at 34, 35, 38; Commission's Brief at 11, 14, 20. But no such veto power is claimed by Interior. If developers are dissatisfied with the conditions included by Interior, their remedy is simple. They may go to court and urge that the conditions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(A) (1982).³² Interior and other land managers are no more immune from judicial review than is the Commission.

³¹ The Commission's rules provide for participation in licensing proceedings through protests (which are essentially comments) and through intervention. 18 C.F.R. § 385.211 (1983) (dealing with protests); 18 C.F.R. § 385.214 (1983) (dealing with intervention). The Departments of the Interior and Agriculture routinely comment and frequently intervene in such proceedings.

³² On rehearing in the instant case the Ninth Circuit clarified procedures for judicial review. Review of all matters connected with the license—whether objections to decisions made by the Commission or to conditions imposed by other agencies—would be had in a single action in the U.S. Court of Appeals pursuant to the FPA's provision for direct review, FPA § 313(b),

(footnote continues)

Yet, rather than take advantage of this common form of action, developers and the Commission would construct a more complex mechanism for review. As they would have it, developers should present their argument on the reasonableness of Interior's conditions not directly to a court, but first to the Commission. The Commission would then sit in judgment on the "reasonableness" of the conditions found necessary by Interior. Should developers be dissatisfied with the Commission's conclusion, they might then appeal the Commission's determination to the U.S. Court of Appeals pursuant to FPA § 313(b), 16 U.S.C. § 825l(b) (1982).

But there the confusion begins. What should the Court of Appeals make of the record below? Presumably it would be required to judge whether the Commission acted arbitrarily in assessing the reasonableness of Interior's finding that the conditions were necessary. Such a convoluted judicial task—in which the court must review the reasonableness of one agency's assessment of the reasonableness of another agency's finding—is without precedent in administrative law.³³

How much simpler it would be for developers to go directly to the U.S. Court of Appeals once the license is issued and present their claim that the conditions mandated by the land manager are arbitrary and capricious. Simple, but much less satisfying to the developers, of course, than getting two bites at the apple.

(footnote continued)

16 U.S.C. § 825l(b). *Escondido Mutual Water Co. v. FERC*, 701 F.2d 826, 827 (9th Cir. 1983), Appendix to Petition at 31. While the Ninth Circuit did not state which standard of review would be applicable to review of such conditions, it seems clear to conservationists that the "arbitrary and capricious" standard, Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(A) (1982), would apply. While other aspects of the relicensing decision may be subject to the more searching "substantial evidence" test, Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(E) (1982), the decision of the land manager regarding licensing conditions is informal agency action not requiring a hearing "on the record" Administrative Procedure Act §§ 5, 7, 8, 5 U.S.C. §§ 554, 556, 557 (1982).

³³ Would, for example, the court be required to determine whether the Commission failed to consider a relevant factor in its determination that the land manager overlooked another relevant factor?

III. THE COMMISSION'S INTERPRETATION OF SECTION 4(e) SHOULD BE GIVEN NO MORE DEFERENCE THAN INTERIOR'S CONTRARY INTERPRETATION.

Petitioners insist that this Court is bound to give "great deference" to the longstanding interpretation of the FPA offered by the Commission. Developers' Brief at 37-38; *see* Commission's Brief at 33. This argument may be disposed of easily.

Each of the many cases this Court has decided on the issue of deference to agency interpretation of law deal with challenges by a private party to decisions or interpretations of a single regulatory agency. Such is not the circumstance here. Instead, positions taken by two federal agencies, each charged with important regulatory responsibilities under the same law, are in conflict. Each agency claims to have maintained its position long and consistently.³⁴

There is no rule of administrative law or statutory construction which can resolve which agency shall receive "more" deference. (Should it be the oldest agency? The largest? The most independent? The most politically responsive?) In cases of conflict between agencies, the Court must let the statute speak for itself.

³⁴ Conservationists do not find that the Commission's position has been held as long as it claims. The early cases cited by petitioners, Commission's Brief at 33; Developers' Brief at 37-38, do not appear to be on point. *See* Interior's Brief in Opposition to Petition for Certiorari at 19.

CONCLUSION

What began as a seemingly parochial Indian water rights dispute has escalated into a debate on the nation's policy of resource management. From a few cubic feet per second of water in an artificial waterway the stakes have grown to literally thousands of contests over the streams and rivers which cross the nation's public forests, mountains, and deserts.

In the next decade an estimated 3,000 applications for hydroelectric licenses will be filed by private parties on our national forests alone.³⁵ Whether the Secretaries charged by Congress with managing those reservations or the Commission established by Congress to monitor the development of the nation's water resources shall have the final say in conditioning those projects is no small matter.

Conservationists bear the scars of years of battle with the Commission over projects which would have flooded such priceless resources as Hell's Canyon on the Snake River dividing Oregon and Idaho or the New River Gorge in the Appalachian Mountains of North Carolina. (Both projects would have been licensed by the Commission but for the intervention of Congress.)³⁶ Consequently a check on the power of the Commission to authorize the destruction of such river resources seems to conservationists eminently sensible.

But neither the wisdom which conservationists see in the balancing of authorities related to river development on public lands, nor the efficiency the Commission sees in consolidating that power in its hands, is an issue for this Court to decide. Such questions are reserved for Congress. Congress has

³⁵ See this brief at 5, n. 9.

³⁶ Hells Canyon National Recreation Area Act §§ 3(a), 4, Pub. L. No. 94-199, 89 Stat. 1117 (1975) (codified at 16 U.S.C. §§ 460gg-2, 1274(a)(12) (1982)) (prohibiting the Commission from issuing a proposed license on the Snake River); Act of Sept. 11, 1976, Pub. L. No. 94-407, 90 Stat. 1238 (1976) (codified at 16 U.S.C. §§ 1273(a), 1278(a) (1982)) (revoking a license granted on the New River).

considered, resolved, and spoken. Its conclusion is stated clearly in section 4(e). Conservationists urge that it be applied.

Respectfully submitted,

NATIONAL WILDLIFE FEDERATION,
 AMERICAN RIVERS CONSERVATION
 COUNCIL,
 CALIFORNIA TROUT,
 COLORADO WILDLIFE FEDERATION,
 ENVIRONMENTAL DEFENSE FUND,
 ENVIRONMENTAL POLICY INSTITUTE,
 FRIENDS OF THE EARTH,
 FRIENDS OF THE RIVER, INC.,
 IDAHO ENVIRONMENTAL COUNCIL,
 IDAHO WILDLIFE FEDERATION,
 IZAAK WALTON LEAGUE OF AMERICA,
 INC.,
 MONTANA WILDLIFE FEDERATION,
 NATIONAL AUDUBON SOCIETY,
 NATURAL RESOURCES DEFENSE
 COUNCIL, INC.,
 OREGON WILDLIFE FEDERATION,
 SIERRA CLUB,
 TROUT UNLIMITED,
 VERMONT NATURAL RESOURCES
 COUNCIL,
 WILDERNESS SOCIETY, and
 WYOMING WILDLIFE FEDERATION,

Amici Curiae

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February 23, 1984

APPENDIX A

Detailed Statement of Interests

The National Wildlife Federation is a nonprofit membership organization incorporated in 1939 under the laws of the District of Columbia. The Federation maintains its headquarters at 1412 Sixteenth Street, N.W., Washington, D.C. 20036 (telephone 202-797-6859). The Federation is the largest nongovernmental conservation education organization in the world, with affiliate organizations in fifty-one states and territories. Its 4.1 million members and supporters are dedicated to increasing public awareness of the need for wise use, proper management, and conservation of our natural resources. The Federation undertakes a comprehensive conservation education program, distributes numerous periodicals and educational materials, lobbies for the adoption of laws to protect and improve the environment, and litigates when necessary to conserve natural resources and wildlife. The Federation's Water Resources Program has undertaken a broad range of legal, legislative, administrative, and educational initiatives aimed at improving the management of our nation's rivers with particular attention given to the sensitive and intelligent development of hydroelectric power. In addition, the Federation's Public Lands and Energy Program actively promotes the conservation of energy from hydroelectric and other power sources.

American Rivers Conservation Council is a nonprofit membership organization incorporated in the District of Columbia. Organized in 1973, it now counts over 4,000 members nationwide. Its business address is 323 Pennsylvania Avenue, S.E., Washington, D.C. 20003 (telephone 202-547-6900). The American Rivers Conservation Council is the only national citizens group dedicated exclusively to river conservation. Its principal activities include seeking additions to the National Wild and Scenic Rivers System, support for state and local river conservation programs, opposition to wasteful or destructive water projects, and expansion of public awareness and appreciation of our river heritage. The Council publishes *American Rivers*, a quarterly journal of river conservation.

California Trout is a nonprofit, tax-exempt corporation organized under the laws of the state of California and having its principal office and place of business at 550 California Street, San Francisco, California 94104 (telephone 415-392-8887). California Trout is a statewide conservation organization supported by sport fishermen, with approximately 1,600 individual members and forty affiliated local angling clubs representing another 2,000 persons. California Trout was organized in 1970 to protect and restore wild trout, native steelhead, and the waters that nurture them in California. California Trout has intervened in numerous licensing proceedings before the Federal Energy Regulatory Commission.

The Colorado Wildlife Federation is organized under the laws of the state of Colorado and is affiliated with the National Wildlife Federation whose goals and objectives it shares. It maintains its headquarters at P.O. Box 18887, Denver, Colorado 80218 (telephone 303-830-2557).

The Environmental Defense Fund is a nationwide public interest organization with approximately 45,000 members. Its staff of lawyers, scientists, and economists works to protect and improve environmental quality and public health. The Fund pursues responsible reform of public policy in the fields of energy and resource conservation, pest control, toxic chemicals, water resources, air quality, land use and wildlife, working through research, public education, and judicial, administrative, and legislative action. The Environmental Defense Fund is organized under the laws of the state of New York with its headquarters at 444 Park Avenue, South, New York, New York 10016 (telephone 212-686-4191).

The Environmental Policy Institute is a nonprofit organization incorporated under the laws of the District of Columbia in 1974. The Institute engages in research, public education, lobbying, and litigation activities in support of energy and water conservation, the protection of air, water and land resources, the safe and clean use of coal, oil, and natural gas, limitations on the use of nuclear power and weaponry, and the protection of agricultural resources and the nation's food resource base. The Institute has over 10,000 contributors and

supporters from around the country. The organization maintains its headquarters at 218 D Street, S.E., Washington, D.C. 20003 (telephone 202-544-2600).

Friends of the Earth is a nonprofit corporation founded in 1969 under the laws of the state of New York. Its headquarters are located at 1045 Sansome Street, San Francisco, California 94111 (telephone 415-433-7373). Friends of the Earth is a national conservation organization with 32,000 members in the United States, and international affiliate organizations in twenty-six other countries. Since its founding, Friends of the Earth has worked to secure preservation and protection of the nation's heritage of outstanding free-flowing rivers and streams, the diminution of which has become an increasing concern to the organization's members in recent years.

Friends of the River, Inc. is organized under the California nonprofit corporation law for the purpose, in part, of advocating the preservation of riparian ecosystems and the natural values of free-flowing rivers in the western United States. Friends of the River actively pursues these goals through its legal, administrative, legislative, research, and public education programs. It maintains its headquarters at Building C, Fort Mason, San Francisco, California 94123 (telephone 415-771-0401). Currently Friends of the River has 3,000 members in more than thirty states.

The Idaho Environmental Council was founded under the laws of the state of Idaho to coordinate and stimulate the creative ideas, manpower, and financial resources of conservation-minded individuals and organizations to provide an increased understanding of modern man's impact upon his environment. The Council is headquartered at P.O. Box 1708, Idaho Falls, Idaho 83401 (telephone 208-345-2030).

The Idaho Wildlife Federation is a state affiliate of the National Wildlife Federation whose goals and objectives it shares. It is organized under the laws of the state of Idaho, and maintains its offices at 432 S. 11th Street, Pocatello, Idaho 83201 (telephone 208-233-3079).

The Izaak Walton League of America, Inc. is organized to promote means and opportunities for educating the public to

conserve, maintain, protect, and restore the soil, forest, water, air, and other natural resources of the United States, and to promote the enjoyment and wholesome utilization of those resources. The League is organized under the laws of the state of Illinois, and is headquartered at 1701 North Fort Myer Drive, Suite 1100, Arlington, Virginia 22209 (telephone 703-528-1818).

The Montana Wildlife Federation is an affiliate of the National Wildlife Federation whose goals and objectives it shares. The Montana Wildlife Federation is organized under the laws of the state of Montana and is headquartered at P.O. Box 3526, Bozeman, Montana 59715 (telephone 406-587-1713).

The National Audubon Society is one of the oldest, largest, and most experienced national conservation organizations. It is devoted to conservation and protection of the natural environment which supports both humankind and wildlife. The Society's 512,000 members in 492 chapters are backed by a full-time staff of 130 persons working in the New York headquarters, Washington, D.C. office, four state offices, four camps, four nature centers, two research centers, and ten regional offices. The staff includes scientists and other professionals specialized in water policy. Among the Society's purposes is the wise use of the nation's water resources and protection of riparian and aquatic habitat. The Society is a nonprofit corporation organized under the laws of the state of New York with headquarters at 950 Third Avenue, New York, New York 10022 (telephone 212-832-3200).

Natural Resources Defense Council, Inc. is a nonprofit membership organization incorporated under the laws of the state of New York. Its headquarters are at 122 East 42nd Street, New York, New York 10168 (telephone 212-949-0049). The Council has approximately 28,000 members residing in all states and territories. Since its inception in 1970, the Natural Resources Defense Council has been dedicated to the prudent management and the wise use of the natural resources of the earth, including energy and water resources, through the advocacy of effective federal, state, and local laws.

The Oregon Wildlife Federation is an affiliate of the National Wildlife Federation whose goals and objectives it shares. The Oregon Wildlife Federation is organized under the laws of the state of Oregon. It maintains its offices at 2753 N. 32nd, Springfield, Oregon 97377 (telephone 503-747-8400).

The Sierra Club is a nonprofit corporation, organized under the laws of the state of California, having its principal office and place of business at 530 Bush Street, San Francisco, California 94108 (telephone 415-981-8634). The Sierra Club is a national conservation organization founded in 1882 with approximately 330,000 members. The purposes of the Sierra Club are to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environment.

Trout Unlimited is a nonprofit international conservation organization incorporated in 1959 under the laws of the state of Michigan. The organization maintains its headquarters at 501 Church Street, N.E., Vienna, Virginia 22180 (telephone 703-281-1100). Its 37,000 members are dedicated to the protection of clean water and the enhancement of trout and salmon resources. Trout Unlimited's twenty-five years of work to enhance salmonoid habitat has involved its members in educational programs, water quality surveillance programs, and field projects designed to restore degraded habitats and provide up- and down-stream passages for fish migration.

The Vermont Natural Resources Council is a state affiliate of the National Wildlife Federation whose goals and objectives it shares. The Council is organized under the laws of the state of Vermont and maintains its headquarters at 7 Main Street, Montpelier, Vermont 05602 (telephone 802-223-2328).

The Wilderness Society is a national conservation organization with approximately 105,000 members nationwide. It is incorporated in Washington, D.C. and maintains its headquarters at 1901 Pennsylvania Avenue, N.W., Washington, D.C. 20006 (telephone 202-828-6600). A primary concern of the Society since its founding in 1935 has been the establishment

and proper management of wilderness areas. Protection of wild and free-flowing rivers through wilderness and wilderness candidate areas is integral to the preservation of their wilderness character. Efforts to preserve wild and free-flowing rivers are ranked high on the Society's conservation agenda.

The Wyoming Wildlife Federation is a state affiliate of the National Wildlife Federation whose goals and objectives it shares. It is organized under the laws of the state of Wyoming and is headquartered at P.O. Box 333, Cheyenne, Wyoming 82003 (telephone 307-637-5433).

APPENDIX B*

*Letter to R. Max Peterson, Chief, U.S. Forest Service,
January 4, 1984*

HAND DELIVER

January 4, 1984

R. Max Peterson, Chief
United States Forest Service
P.O. Box 2417
Washington, D.C. 20013

Attention: Richard D. Hull
Director of Lands
United States Forest Service

Dear Chief Peterson:

The National Wildlife Federation and other environmental organizations are deeply concerned with the exponential growth in proposals for hydroelectric power projects within national forests and other federal reservations. We would appreciate an answer to each of the following questions regarding the numbers of development proposals within reservations under the Secretary of Agriculture's jurisdiction, and the process by which the Secretary exercises his responsibilities under section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e) (1982), and other applicable law in protecting, managing, and utilizing these lands and resources.

1. Please describe the process used by the Department of Agriculture to develop necessary conditions pursuant to section 4(e) for hydroelectric power licenses within reservations under the jurisdiction of the Secretary of Agriculture.

* In appending this correspondence to their brief, amici curiae do not seek to supplement the record on review. Rather they wish solely to identify matters of public fact, *Muller v. Oregon*, 208 U.S. 412, 419-21 (1907) (on "the Brandeis brief"), which demonstrate the gravity of problem posed.

2. During fiscal year 1983, how many hydroelectric power applications (for licenses, permits, and exemptions) were noticed to the Department of Agriculture by the Federal Energy Regulatory Commission within reservations under the Secretary's jurisdiction? What percentage of all applications noticed during fiscal year 1983 do the applications within these reservations constitute? If possible, please provide a breakdown (1) by category of application (license, permit, and exemption) and (2) by reservation, for these applications.

3. In approximately what percentage of cases, both historically and currently, does the Secretary of Agriculture exercise his conditioning power under section 4(e) with respect to applications for licenses within reservations under the Department's jurisdiction? In what percentage of these cases does the Commission include without significant modification all the conditions imposed by the Secretary in the licenses it issues? How does the Department deal with those instances in which the Commission significantly modifies or rejects conditions which the Department has found necessary to impose?

Sincerely,

Christopher H. Meyer
Counsel
Water Resources Program

*Letter from R. M. Housley, Deputy Chief, U.S. Forest Service,
January 17, 1984*

United States Department
of Agriculture
Forest Service
Washington Office
12th & Independence, SW
P.O. Box 2417
Washington, D.C. 20013

Reply to: 2770

Date: Jan 17 1984

Mr. Christopher H. Meyer
Counsel
Water Resources Program
National Wildlife Federation, NW
Washington, D.C. 20036

Dear Mr. Meyer:

This is in response to your January 4 letter and Dave Conrad's discussions with members of our Lands Staff, concerning the Department of Agriculture's role in the Federal Energy Regulatory Commission (FERC) hydroelectric licensing process.

Answers to your questions are as follows:

Question 1. Exhibit 1 includes a flow chart and a general description of our process for handling FERC projects. Special conditions are only developed to avoid or mitigate environmental impacts caused by project operations not adequately covered in the Commission's standard form license articles. The special conditions are drafted by functional specialists most knowledgeable of the impact. They are then subjected to a rigid review to assure clarity, applicability, reasonableness, that the conditions are within our jurisdictional authority and that they conform to Agency and Department policy.

Question 2. The number of hydroelectric power applications reviewed by the Department during fiscal year 1983 is

shown in Exhibit 2. The table breaks the data down by type of applications, type of action, and by Forest Service Region. The table distinguishes between those affecting National Forest System (NFS) lands and other (non-FWS) lands.

Question 3. The Secretary of Agriculture exercises his conditioning power under Section 4(e) on all license applications directly affecting Department programs. This amounts to about 60 percent of all license applications. Approximately 66 percent of our section 4(e) responses to FERC include one or more special license conditions. The Commission includes without significant modification approximately 80 percent of these special conditions in licenses issued.

How we have handled the significant modifications or rejections depends on the seriousness of the impact, the overall reasonableness of our request, extraneous circumstances, such as cases where the license had been issued before FERC had received our 4(e) report. Exhibit 3 includes samples of our 4(e) report, how they were handled by the Commission and a note on our follow up action if any.

Our basic approach is to notify FERC of the discrepancy if significant and, since the passage of the Federal Land Policy and Management Act (FLPMA), deny the licensee access to NFS lands. After exhausting the administrative appeal process, our backup is through litigation.

Sincerely,

R. M. Housley
Deputy Chief

[Attachments omitted]

Letter from J. B. Hilmon, Acting Deputy Chief, U.S. Forest Service, February 14, 1984

United States Department
of Agriculture
Forest Service
Washington Office
12th & Independence, SW
P.O. Box 2417
Washington, D.C. 20013

Reply to: 2770

Date: February 14, 1984

Mr. Christopher H. Meyer
1412 Sixteenth Street, NW
Washington, D.C. 20036

Dear Mr. Meyer:

This supplements our January 17 letter concerning the Department of Agriculture's role in the Federal Energy Regulatory Commission (FERC) hydroelectric licensing process.

An extrapolation of data derived from an analysis of applications for license or amendment of license received during the past four years indicates that in the next decade some 3,000 applications will be filed with the Federal Energy Regulatory Commission that will affect National Forest lands. Each application is reviewed carefully and conditions are developed to adequately protect or mitigate damage to resources under our charge. The purposes of the conditions are compromised when FERC substantially modifies or rejects our recommendations.

Based on a sampling of 201 license (or amendment) applications, where licenses were issued during the period between April 18, 1980, and January 13, 1984, or pending as of January 30, 1984, we find that out of 19 licenses issued during this period affecting National Forest lands, in 13 instances the Secretary of Agriculture included conditions by authority of

Section 4(e) FPA (41 Stat. at 1065) as amended. Of the 13 cases where 4(e) conditions were included:

6 were accepted by the Commission without substantial modification;

1 was accepted but with substantial modification;

3 of the cases involved some outright rejections of our 4(e) conditions; and

3 of the cases involved Commission-issued licenses where all of our 4(e) conditions were rejected.

Although this is not an inclusive listing of all license cases under review during this period, we do feel this is a representative sample.

The Secretary of Agriculture exercises special care in establishing specific 4(e) conditions which we believe to be essential and in distinguishing these conditions from general comments or recommendations regarding FERC applications for license applications (See Tables 1 and 2, enclosed).

Sincerely,

J. B. Hilmon
Acting Deputy Chief

Enclosures

[Attachment to Letter of February 14, 1984]

TABLE 1

	1	2	3	4	5	6	7
	No. of Projects Reviewed in Sample ⁴	4(e) Letter to FERC No. (%) ¹	4(e) Included in Letter No. (%) ²	Conditions Without Substantial Modifi- cation No. (%) ³	With Some Substantial Modifi- cations No. (%) ³	With Some Rejections No. (%) ³	Where All Were Rejected No. (%) ³
Licenses Issued or Amended							
Involving FS Lands							
Licenses	19	13	13	6	1	3	3
Amendments	20	11	8	3	1	1	3
Subtotal	39	24(62)	21(88)	9(43)	2(10)	4(19)	6(28)
Other Lands							
Licenses	40	14	1	1			
Amendments	17						
Subtotal	57	14(25)	1(7)	1(100)			
Total Issued or Amended	96	38(40)	22(45)	2(45)	2(9)	4(18)	6(27)
Licenses or Amendments Pending as of 1/30/84							
Involving FS Lands							
Licenses	72	72	43				
Amendments	4	4	3				
Subtotal	76	76(100)	46(61)				
Other Lands							
Licenses	29	29	4				
Amendments							
Subtotals	29	29(100)	4(14)				
Total Pending	105	105(100)	50(48)				
Total Reviewed	201						

¹ Column 2 % Column 1² Column 3 % Column 2³ Columns 4, 5, 6, or 7 % Column 3⁴ Sample a sampling of licenses and amendments issued during April 18, 1980, and January 13, 1984, or pending as of January 30, 1984.

[Additional Attachment omitted]

No. 82-2056-CFX
Status: GRANTED

Title: Escondido Mutual Water Company, et al., Petitioners
V.
La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands
of Mission Indians, et al.

Docketed:
June 15, 1983

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Engstrand, Paul D., Foster, Kent H.

Counsel for respondent: Gajarsa, Arthur J., Pelcyger, Robert
S., Solicitor General, Feit, Jerome

Entry	Date	Note	Proceedings and Orders
1	Jun 15 1983	G	Petition for writ of certiorari filed.
2	Jun 15 1983		Appendix of petitioner Escondido Mutual Water Co. filed.
3	Jul 15 1983		Brief amicus curiae of Joint Board of Control of the Flathead Mission, et al. filed.
5	Jul 20 1983		Order extending time to file response to petition until August 22, 1983.
6	Aug 20 1983		Order further extending time to file response to petition until September 21, 1983.
7	Aug 24 1983		Brief of respondents LaJolla, et al. in opposition filed.
8	Sep 21 1983		Brief amicus curiae of Amer. Public Power Assn. filed.
9	Sep 21 1983		Brief of respondent United States in opposition filed.
10	Sep 27 1983		Reply brief of petitioners Escondido Mutual Water Co., et al. filed.
11	Sep 21 1983		Brief amicus curiae of CO River Water Conserv. Dist. filed.
12	Sep 28 1983		DISTRIBUTED. October 14, 1983
14	Oct 11 1983	X	Supplemental brief of respondents LaJolla, et al. filed.
15	Oct 17 1983		Petition GRANTED. *****
17	Nov 18 1983		Order extending time to file brief of petitioner on the merits until December 15, 1983.
18	Dec 15 1983		Brief amicus curiae of Edison Electric Institute filed.
19	Dec 15 1983		Brief amicus curiae of American Public Power Assoc., et al. filed.
20	Dec 15 1983		Brief amicus curiae of Joint Bd. of Control etc., et al. filed.
21	Dec 15 1983		Brief of respondent FERC Urging Reversal filed.
22	Dec 15 1983		Brief of petitioners Escondido Mutual Water Co. filed.
23	Dec 15 1983		Joint appendix filed.
24	Dec 27 1983		Record filed.
25	Dec 27 1983		Certified original record, 11 volumes, received.
26	Dec 28 1983	G	Motion of the Solicitor General to permit divided argument on behalf of petitioners and on behalf of respondents filed.
28	Dec 29 1983		Order extending time to file brief of respondent on the merits until February 23, 1984.
29	Jan 16 1984		Motion of the Solicitor General to permit divided argument on GRANTED.
30	Feb 14 1984		SET FOR ARGUMENT. Monday, March 26, 1984. (1st case)
31	Feb 23 1984		Brief of respondents LaJolla, et al. filed.
32	Feb 23 1984		Brief amicus curiae of National Wildlife Federation, et al.

Entry	Date	Note	Proceedings and Orders
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33	Mar 16 1984	X	filed.
34	Mar 19 1984	X	Reply brief of petitioners Escondido Mutual Water Co. filed.
35	Mar 26 1984	X	Reply brief of respondent FERC filed.
			ARGUED.